(30,501)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 536

E. C. F. SANCHEZ, EUGENE E. SANCHEZ, MABEL SANCHEZ, ET AL., APPELLANTS,

vs.

JAMES DEERING

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

E. C. F. SANCHEZ, EUGENE E. SANCHEZ, MABEL SANCHEZ, MERCEDES A. SANCHEZ, AND WILLIAM J. SANCHEZ,

Appellants,

versus

JAMES DEERING.

Appellee.

It is stipulated and agreed by counsel for appellants and counsel for appellee that the Clerk shall print only the following parts of the transcript of the record filed in said cause, to-wit:

(1) The bill of complaint.

(2) The motion to dismiss.

(3) The opinion of the District Judge.

(4) The decree dismissing the bill.

(5) The assignment of errors.

W. W. DEWHURST,
Solicitor for Appellants.

F. M. HUDSON,
Solicitor for Appellee.

BILL OF COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF FLORIDA, IN CHANCERY.

E. C. F. SANCHEZ, ET AL.,
Complainants,

versus

JAMES DEERING,
Defendant.

To the Honorable Rhydon M. Call, Judge of said Court:

E. C. F. Sanchez, a citizen and resident of Gainesville, in Alachua County, State of Florida; Eugene Sanchez, a citizen and resident of Jacksonville, in Duval County, Florida; Mabel Sanchez, a citizen and resident of Gainesville, County of Alachua, State of Florida; Mercedes A. Sanchez, a citizen and resident of St. Augustine, in St. Johns County, State of Florida; and William J. Sanchez, a citizen and resident of St. Augustine, in St. Johns County, State of Florida, bring this, this bill of complaint against James Deering, a citizen of the State of New York, residing in the City of New York, in said State of New York, and thereupon complaining, your orators say:

First: They bring this their bill in the Federal Court because the matter in controversy greatly exceeds the value of Three Thousand Dollars, and arises under a treaty made by the United States with the King of Spain, and under the laws of the United States for the settlement of private land claims in the Floridas and

the law directing the issuance of patents upon confirmed claims to lands in East Florida, the Acts of Congress approved respectively May 8th, 1822, March 3rd, 1823, February 28th, 1824, February 8th, 1827 and May 23rd, 1828.

2 Second: That on, to-wit, the 16th day of January, A. D. 1805 while the Floridas were under the dominion of Spain, one Pedro Fornells applied to Enrique White, Governor of East Florida, the King's Deputy, for the grant of 175 acres to be located on Key Biscayne; that this application was granted by Governor White on, to-wit, the 18th day of January, 1805; that in accordance with the laws and regulations then in force in the Spanish Province of East Florida said concession was an inchoate grant, needing to be duly surveyed, and after survey to be followed by a royal title by which the lands granted would be segregated from the Royal Dominion and set off to Pedro Fornells; that no survey was made and the Royal Title was not issued before the cession of the Floridas to the United States.

Third: That Pedro Fornells, on, to-wit, the 19th day of May, 1793, was lawfully married to Mariana Tuforior, widow of Marcus Andreu; that the lawful issue of said marriage was a daughter, Antonia Porsila or Proala; that Pedro Fornells died intestate on to-wit, the .... day of ....., A. D. 1920, leaving as his only heir at law his said daughter, Antonio Porsila or Porala; that said widow had by her former husband a son named Rafael, born on to-wit, July 7, 1786.

Fourth: That on the 22nd day of February, A. D. 1819, the United States entered into treaty with the

King of Spain, afterwards ratified, whereby the King ceded to the United States, East Florida, and it was by said treaty stipulated that all grants of land made before the 24th day of January, 1818, by his Catholic Majesty, or by his lawful authorities in the said territories ceded by his Majesty to the United States shall be (stand) ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty; that under said treaty East Florida was delivered to the United States authorities on July 10th, 1821.

Fifth: By act of March 3rd, 1823 (3 Stats. 754) Congress provided for the appointment of three Commissioners "for ascertaining titles and claims in East Florida with the powers given by the Act of Congress approved May 8th, 1822; that Section 5 of said Act of 1822 empowered the confirmation of claims to land arising under grants, concessions and orders of survey, if satisfied that said claims be correct and valid (3 Stats. 709); that Section 3 or the Act of May 8th, 1822, under which said Commissioners to ascertain titles to land were appointed, directed that every person or the heirs or legal representatives of such persons claiming title to lands under any patent, grant, concession or order of survey dated previous to the 24th of January, 1818, which were valid under the Spanish Government * * * Shall file before the Commissioners his, her or their claim, setting forth particularly the situation and boundaries, if to be ascertained, with the deraignment of title where they are not the grantees or original claimants; which shall be recorded by the Secretary, etc.; that under these acts Alexander Hamilton,

Davis Floyd and W. H. Allen were appointed Commissioners and entered upon their duties; that on August 1, 1823, the Board of Land Commissioners adopted regulations under which they would determine claims, one of which was that all persons claiming title to lands under any patent, grant, concession or order of survey would make a brief statement by a memorial, setting forth the situation, and if possible, deraignment of title to the lands claimed, etc.; that on January 22, 1824, Alexander Hamilton refused to take part in the adjudications of said Board, and assigned his reason for relinquishing his said position, that his associates refused to secure and examine original papers and records and "were practicing the law in actions of real estate involving questions conflicting interests which are the immediate subjects of their adjudication."

Sixth: That Waters Smith was United States Marshal and William Goodwin Davis the Deputy United States Marshal in attendance on said Board of Commissioners at its session in July and December, 1824, that Mary Ann Davis was then the wife of William Goodwin Davis; that at the session of said Board of Land Commissioners held July 23, 1824, Mary Ann Davis presented to said Board a claim for confirmation of said grant to Pedro Fornells of 175 acres on Key Biscayne; that it was possible for Mary Ann Davis to have presented with her memorial a legal deraignment of title to said grant to Peter Fornells; that if, under the law then prevailing in the Province of East Florida, prior to its cession to the United States, the mother of Raphael Andreu had a garnancial interest in said lands granted Pedro Fornells, such deraignment of title would have shown the interest of Raphael Andreu in

said grant as the half brother of Antonia Porala or Porsila, and would have shown that said Antonia Porala or Porsila was a tenant in common with said Raphael Andreu of the equitable title to said grant; that Mary Ann Davis fraudulently presented to said Land Commissioners a false statement as to the claim of the legal representatives of Pedro Fornells, and sought to maintain said claim by contradictory false and fraudulent affidavits when legal evidence of the true facts existed and were available, the existence and availability whereof must have been known to the said Mary Ann Davis.

A certified copy of said memorial, grant to Pedro Fornells, deed of conveyance from Raphael Andreu to Mary Ann Davis of his right, title and interest in said grant, the affidavits and the finding and decree of said Board of Land Commissioners, are hereto attached, marked Exhibit "A", and made a part of this bill as fully as if here set out at length.

Seventh: That prior to June 30th, 1827, the United States had built a light house on Key Biscayne and although the lands granted to Fornells had never been surveyed on said 30th day of June, 1827, said William Goodwin Davis and Mary Ann Davis, for a consideration of $225.00 executed a deed of conveyance to the United States of America to a tract of three acres on said Key Biscayne, having the following lines and measurements:

"Beginning at the Water's edge, the first line runs North Fifteen degrees West, Nine Chains; the second line runs South 75 degrees West, Eight Chains; the third line runs South Fifteen degrees East, ten chains; the fourth line meanders along the ocean beach,"

said three acres having been surveyed by J. Ives and a plat thereof made April 25, 1827.

Eighth: That from A. D. 1827 to about A. D. 1850 said tract of land then unsurveyed and unsegregated from the public domain except the three acres conveyed to the United States of America remained as it has to this day remained, and yet remains wild, unoccupied land, not in the actual occupancy of any person claiming title thereto; that on, to-wit, the 6th day of May, 1843, Antonia Porsila, daughter of Peter Fornells and Mariana Tudorina, for a consideration of $400.00, sold and conveyed to Venancio Sanchez, a merchant residing at St. Augustine, Florida, the undivided half of the 175 acres granted Peter Fornells on Key Biscayne that said deed of conveyance duly executed and acknowledged was by said Sanchez recorded in the Public Records of Monroe County, Florida, in which county the land lay, on the 26th day of May, 1843, and was also on, to-wit, June 10th, 1843, recorded in the Public records of St. Johns County, where the deed from Rafael Andreu to Mary Ann Davis had been recorded. A copy of said deed and of the power of attorney under which said deed was executed is hereto attached, marked "Exhibit B," and made a part of this bill as if here fully set forth; the original of said power and said deed are in the possession of your orators, ready to be exhibited to this Court at the hearing of this cause.

Ninth: That after the record of his said deed to an undivided half interest in said grant to Peter Fornells on Key Biscayne said Venancio Sanchez openly asserted ownership of one-half of said tract of 175 acres granted to Fornells and confirmed to Mary Ann Davis; that

thereafter said William Goodwin Davis, acting for and on behalf of his wife, Mary Ann Davis, proposed to said Sanchez, in writing, that they jointly place settlers on said Key Biscayne, sell lots thereon, collect wharfage and storage, get "respectable wreckers, with substantial vessels to bring their goods to the island and make it their homes, and their vessels to hail from the town of Key Biscayne"; "that all money from the sale of lots to be equally divided between the parties," and that "if either party in the term of three years from the time of settlement should wish to dissolve and do business for himself he is to give the other party six months notice in writing, and then the parties will divide, by choosing lots alternately, and the balance to be divided by two or three disinterested persons."

Tenth: That in A. D. 1847, under direction of the Surveyor General of Florida the United States surveyed 175 acres in Township 55 S. of Range 41 East, on Key Biscayne as the lands granted Fornells by Governor White on Key Biscayne, the field notes whereof being as set forth in the patent hereinafter described; that from A. D. 1847 to A. D. 1892, said Venancio Sanchez had the undisputed ownership of an undivided one-half of said tract of land so annexed by the United States as the lands granted to said Peter Fornells (except three acres claimed as a lighthouse reservation by the United States, the metes and bounds whereof are set forth in paragraph seven of this bill) and was in the constructive possession of the whole of said grant surveyed as aforesaid (except only the ground on which the
6 lighthouse and the light keepers house stood).

That on, to-wit, August 3rd, A. D. 1892, the said Venancio Sanchez by his Attorney, attempted to

notify Mr. Edward Davis, a son of Mary Ann Davis, then deceased, at Galveston, Texas, in writing, of his intention to procure a patent from the United States to said part and asked said Davis whether Mary Ann Davis had deeded the interest she bought of said Andreu, and for information as to the heirs of Mary Ann Davis. Edmund J. Davis having died about A. D. 1884 as afterwards learned, the letter fell into the hands of Waters S. Davis, who for a long time made no reply, but on, to-wit, June 3, 1893, obtained from his co-heirs at law of said Mary Ann Davis, who died intestate about A. D. 1885, for the named consideration of $400.00, a quit-claim deed of conveyance of the tract of land surveyed by the United States as the grant to Pedro Fornells. That Mary Ann Davis acquired and held only the interest of Raphael Andreu in said grant which was such undivided interest in said grant as descended to Raphael Andreu through his mother, Mariana Fudori or Fudorina; that the heirs of Mary Ann Davis, deceased intestate, took and held only said undivided interest, and said Davis by said deed and by descent took and held only said undivided interest, and never took or held even a paper title to the beneficial interest in more than the undivided interest in said 175 acres on Key Biscayne which was conveyed to Mary Ann Davis by Raphael Andreu even after the issuance of the patent as hereinafter recited; that prior to the issuance of said patent said Waters Smith visited St. Augustine and proposed to said Venancio Sanchez that he either buy his (Davis') undivided interest in said grant, or he (Sanchez) sell his undivided half-interest in said grant to said Davis; the said Venancio Sanchez declined to sell at the price offered, or to buy at the price charged, and said Davis left with said Sanchez, his said Davis' post

office address in his own handwriting, and thereafter, failing to sell his undivided interest to said Sanchez, or to acquire from said Sanchez his half interest, said Waters Smith Davis, on, to-wit, August 10, 1893, applied for a patent, and thereafter, unknown to said Sanchez, prosecuted the claim confirmed to Mary Ann Davis before the Land Department of the United States for the issuance of a patent thereon, and on the 23rd day of April, A. D. 1896, the Commissioner of the General Land Offifce issued a patent on said claim which is recorded in Volume 19, pages 589 and
7 593 of the records of the General Land Office. Said patent is in the usual form. Recites the confirmation of the claim of Mary Ann Davis under Pedro Fornells by the Act of Congress approved March 3, 1823, and again confirmed by the Act of February, 8, 1827, the United States survey locating said grant in Township 55, South, Range 42 East on Key Biscayne, giving the field notes of said survey and a plat of said grant and all of Key Biscayne, with a reference to the American State papers setting forth the action of the Board of Land Commissioners on said claim and releasing and quit-claiming to Mary Ann Davis the land described in accordance with the law in such case made and provided."

Eleventh: Learning of the issue of said patent in the name of Mary Ann Davis, when it should have issued to the legal representatives of Peter Fornells, deceased, the attorney of said Venancio Sanchez on, to-wit, the 12th day of May, A. D. 1896, filed in the office of the Surveyor General of Florida a protest on behalf of said Sanchez against the delivery of said patent, in words and figures as follows:

Tallahassee, May 12th, 1896.

Now comes Vanancio Sanchez, by W. W. Dewhurst, his attorney, and makes and files with the Honorable W. H. Milton, Jr., Surveyor General, his protest against the issuance and delivery to W. G. Davis or to the heirs or legal representatives of Mary Ann Davis of the United States Patent dated April 23rd, A. D. 1896, recorded in Volume 19, pp. 589-593, for 179-45/100 acres of land on Key Biscayne, T. 55 S. R. 42 East on the following grounds:

That at the time said claim of Mary Ann Davis was presented to the Board of Land Commissioners he, the said Venancio Sanchez, in his own right and as trustee for his brother, owned in fee simple an undivided half interest in the said tract of land, claimed by Mary Ann Davis, by deed of conveyance from a daughter of said Peter Fornills (or Fornelli) and that the affidavits of Pedro Miranda and Bartolo Ponce set out on page 218 of Vol. 4, Amer. State Papers (Duff Green Edition) that Rafael Andreu was the sole heir of Peter Fornells was not true.

And he says that the deed of conveyance for an undivided half interest in said grant to Peter Fornelli on Key Biscayne was recorded by him many years ago in Key West and the original is in his possession ready to be produced.

(Signed) VENANCIO SANCHEZ,
By W. W. DEWHURST,
His Atty.

That thereafter, on to-wit, August 5, 1896, the Commissioner of the General Land Office overruled said

protest, and on appeal the Secretary of the Interior sustained said commissioner on to-wit the 1st day of July, A. D. 1898, and thereafter said patent was delivered to Waters Smith Davis; that the opinion rendered by said Commissioner was soon thereafter published,
8 and is contained in the printed volumes of Decisions of the Department of the Interior relating to public lands. The original of said opinion is among the files of the office of the Surveyor General of Florida, now in the custody of the Commissioner of Agriculture of the State of Florida at Tallahassee; said opinion sets out that a copy of the deed from Antonio Porcila do Barrosa to Venancio Sanchez was furnished the Commissioner of the General Land Office and recites the grounds of Mr. Sanchez's protest against the issue of the patent. The opinion failed to consider the act of February 8, 1827 (4 Statutes 202) and wrongly concluded that the confirmation of the claim by Congress was a bar to any examination into the merits of the case by the Commissioner of the General Land Office, but said opinion and its recitations became in August, A. D. 1896, record evidence of the title under which your orators held, and constructive notice to subsequent purchasers, of the claim of title made by Venancio Sanchez to a hald interest in said 175 acres on Key Biscayne; that counsel for Venancio Sanchez filed on to-wit, May 26, 1896, in the General Land Office, a brief and argument, together with the affidavit of Venancio Sanchez, reading as follows:

"State of Florida,
St. Johns County:

Venancio Sanchez being duly sworn says he is 87 years old, that he was born in St. Augustine, Florida,

and has resided in said city all his life; that some time about the year, A. D. 1840, his attention was called to Key Biscayne by one W. G. Davis, husband of Mary Ann Davis, who proposed to affiant to join him, said Davis, in developing Key Biscayne, and making it a Port of Entry, that soon after affiant visited said Key Biscayne, and being pleased with it was about to accept the proposition of said Davis but discovered that said Davis or his wife owned but an undivided half or third interest in the land on said Key, that affiant found that the owner or owners of the other half or two thirds interest in said lands lived in Havana, Cuba, and affiant soon thereafter went to Havana, personally met the owners of the other half interest in said Key Biscayne, went with them before the U. S. Consul in Havana and purchased from said owners their said interest in Key Biscayne which in the deed is described as half interest, and paid them therefore the sum of Four Hundred Dollars, that affiant immediately recorded his deed of conveyance in Monroe and St. Johns Counties, Florida, and openly asserted undisputed ownership of an undivided half interest in said lands; that said transaction occurred many years ago and affiant does not now recollect all the details of the relationship of his grantors to Peter Fornells or Bonelli to whom the said lands were granted, but affiant recollects that one of his grantors declared to him that she was the sister of Rafael Andreu the grantor to Mary Ann Davis for an interest in said Key, and affiant personally knew Rafael Andreu said grantor who was a cooper by trade and worked in St. Augustine, that affiant after his purchase of a half interest in said Key Biscayne often conversed with said Wm. G. Davis, that said Davis never disputed affiants joint ownership and title to a half interest in said lands

on Key Biscayne, but thereafter Mr. Davis made affiant a further proposition for the development of said island and in pursuance of an agreement between affiant and said Davis for the development of their joint property, affiant undertook to secure a colony from St. Augustine to settle on said island of Key Biscayne and among others secured as settlers J. C. Cleland, Sampson Williams, Dr. W. H. Simmons and Joseph Hernandez, but said settlement was never carried out; that affiant has had undisputed ownership since A. D. 1843 of a half interest in said 175 acres granted to Fornells or Bonelli on said Key Biscayne, and his right to same has within three years been recognized by Mr. W. S. Davis, the applicant for a patent from the United States for the said lands; that Mr. Davis has visited him at his store within the last three years, and proposed to affiant that he either buy or sell his undivided interest in said tract, that is that he buy his, Davis' interest, or sell to Davis his, affiant's, interest.

(Signed) VENANCIO SANCHEZ.

Sworn to and subscribed before me, this 28th day of May, A. D. 1896."

That after August 5th, 1896, counsel for Venancio Sanchez filed in said office a second brief and arguments setting out the facts and law applicable to the said grant made by Governor White to Pedro Fornells and how the undivided one-half thereof became vested in Venancio Sanchez, together with a copy of the deed to Mr. Sanchez mentioned in his affidavit, and your orators say; said protest, affidavit, statement of facts and arguments of counsel are all on file in the office of the Commissioner of the General Land Ofice, and have

been since A. D. 1896, and constitute constructive notice to subsequent purchasers of the ownership and possession of Venancio Sanchez of the undivided one-half of the grant of 175 acres on Key Biscayne, surveyed as Section ...., Township 55 S, Range 42 East; that said patent for said Spanish Grant is recorded in Volume 19, pages 589 to 593 of the records of said General Land Office; that by law there is no other place where said patent is entitled to record; that said patent and all proceedings had in the General Land Offfice with respect to the issuance and delivery thereof, constitute one record, and are notice to subsequent purchasers of the facts which are in said record set forth, and of the law applicable to said facts.

Twelfth: That the lands surveyed by the United States as the grant to Pedro Fornells and by the metes and bounds patented has a frontage of fifty-five chains on the Atlantic Ocean, and about the same frontage on the Bay of Florida, and the owners thereof on the 27th day of December, A. D. 1856, received a grant from the State of Florida to all that tract of land lying between the water boundary of their said lands as surveyed by the United States and the edge of the channel; that said grant was and is a valuable interest in a strip of land covered by water more than a mile long and of a width equal to the space between the shore line and the edge of the channel of the bay of the sea washing said patented lands, to which strip of land covered by water, Chapter 791 Laws of Florida vested in the then owners of the grant to Pedro Fornells the full title, with the full right and privilege to build wharves into said waters and to fill up from the shore or beach as far as may be desired and upon the

lands so filled to erect buildings and also the right to prevent encroachment of any other persons upon said strip of submerged land, and to maintain action of trespass for any interference with such property; that at the rate of said Riparian act Venancio Sanchez was the owner of the undivided one-half of the said tract of land surveyed by the United States in A. D. 1847 as the grant of Pedro Fornells and in him vested by said Riparian Act an undivided one-half interest in the full title to said strip of submerged lands as tenant in common with the legal representatives of Pedro Fornells; that if Mary Ann Davis acquired any estate in said grant to Pedro Fornells, that as to all of said strip of submerged land, except the three acre tract by her conveyed to the United States, she became by said grant a tenant in common with said Venancio Sanchez; that as to the strip of submerged land in front of the tract described in paragraph seven of the bill, the United States and Venancio Sanchez became by said Riparian Act, tenants-in-common; that on to-wit, March 4, A. D. 1903, Waters Smith Davis for the consideration of Four hundred dollars obtained a deed for conveyance from the United States to said light-house reservation of three acres by the same metes and bounds set out in paragraph seven of this bill; that whether the United States conveyed to said Waters Smith Davis their Riparian rights in said strip of submerged lands your orators are not advised.

Thirteenth: That Venancio Sanchez died in A. D. 1899, intestate, leaving your orator, William J. Sanchez, his son, his only heir at law; that on to-wit, the 10 day of May, A. D. 1915, the Probate Court of St. Johns County, having jurisdiction, made an order that no administration upon the estate of said Venancio Sanchez

was necessary; that in his lifetime before the issuance of said patent, on to-wit, the 17th day of June, A. D. 1895, being then owner of the Riparian rights in the last paragraph described, and seized and possessed of the beneficial interest in an undivided one-half of the lands granted to Pedro Fornells, said Venancio San-
11 chez executed a deed of conveyance of one-half of his undivided one-half of said granted lands to his brothers' children, namely, the complainant, E. C. F. Sanchez, Mary A. P. Sanchez, in her own right and Mary A. P. Sanchez as trustee for the children of her deceased brother, the complainants, Eugene Sanchez and Mable Sanchez, and for Sidney Sanchez, brother of said last named complainants, now deceased, wherein and whereby said Venancio Sanchez conveyed to said named grantees an undivided one-quarter interest in the lands granted to Pedro Fornells by Governor White on Key Biscayne, containing 175 acres; which deed of conveyance, duly acknowledged by the grantor was recorded in the public records of Dade County, Florida, on the 17th day of June, A. D. 1895, and became constructive notice to subsequent purchasers of the estate and interest taken in A. D. 1843 and held by said Venancio Sanchez in said tract of 175 acres on Key Biscayne and of the estate and interest held by these complainants as co-tenants under said recorded deeds; that since the record of said last described deed said Mary A. P. Sanchez died intestate, leaving as her only heirs at law, a brother, said E. C. F. Sanchez, said Eugene Sanchez a nephew and said Mable Sanchez a niece, and the trust estate granted her by said deed from her uncle became merged into the equitable estate held by the complainants, Eugene Sanchez and Mable Sanchez as to said two complainants, and descended to

said E. C. F. Sanchez as to the share taken by him in said trust estate upon the same trust held by said Mary A. P. Sanchez in her lifetime; that Sidney Sanchez named in said deed from Venancio Sanchez died single and intestate during the life of said Mary A. P. Sanchez, and his equitable estate being one-thirty-sixth of said grant to Peter Fornells descended to his heirs at law, Mercidez A. Sanchez, his mother, and his brother Eugene Sanchez and his sister Mable Sanchez, all of whom are complainants herein; that in said deed to his brother's children and grandchildren said Benancio Sanchez did not include the Riparian rights vested in him by Chapter 791 Laws of Florida, and the title of the same rests in your orator, William J. Sanchez.

Fourteenth: That on the 28th day of June, A. D. 1913, Waters S. Smith, then the depositary of the legal estate for the convenience and benefit of your orators as to a one-half undivided interest in said grant to
12 Fornells, joined by his wife, made a deed to the defendants, James Deering, of New York City, purporting to convey to said defendant all the land granted by Governor White to Peter Fornells as surveyed by the United States, and other land on Key Biscayne, such other lands having been acquired by said Davis by mesne conveyance from the State of Florida as swamp lands granted the State by the Act of September 20, 1850, in which other lands your orators claim no estate or interest; that on said 28th day of June, A. D. 1913, the said lands granted to Peter Fornells were unenclosed unoccupied wild lands, mostly too low for occupancy, and except for a strip of sand ridge on the ocean front, covered by a growth of mangrove shrubs and trees, and such must have been their character at

the date of said grant and at all times thereafter to the time of filing this bill, except only that without enclosure and without cultivation or other improvement than a few cocoanut trees on the lot of three acre described in the twelfth paragraph of this bill, there stands the old Cape Florida Lighthouse, long since abandoned and deserted, and part of the light keepers house, the greater part whereof has washed into the sea.

Fifteenth: That the defendant, James Deering, has never personally had any possession of said lands granted to Fornells; that he has put a keeper on Key Biscayne who has a habitation somewhere on the island, but said defendant by his said keeper or otherwise has never taken an exclusive possession of said grant, and no part of said grant has been enclosed or in any manner cultivated or improved, nor has said defendant ever performed on said grant or caused to be performed thereon any of the acts required to constitute adverse possession by Section 1721, General Statutes of Florida; that the constructive possession had by Venancio Sanchez in his lifetime, which passed to your orators by descent and as grantees of said Sanchez, in A. D. 1895, and which under the treaty between the United States and Spain and the Acts of Congress respecting land claims thereunder follows the beneficial ownership of an interest in said lands has been unbroken and continued in your orators as co-tenants with the defendant, James Deering, insofar as said defendant is a legal representative of Pedro Fornells of the whole of said grant to Fornells, including the three acre tract on which the lighthouse was built, said three acre tract having been abandoned by the United States long before the 4th of March, 1903, and having never been enclosed or cultivated.

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Sixteenth: That Section 5 of said Act of May 8th, 1822, provided that the confirmation by said Board of Commissioners appointed to ascertain titles "shall only operate as a release of any interest which the United States may have, and shall not be considered as affecting the rights of third persons"; That Section 2 of the Act of February 8th, 1827, prescribed that the confirmation of any claim by the Commissioners appointed to settle private land claims in East Florida shall not be construed "to prevent or bar the judicial decision between persons claiming title to lands confirmed"; that although confirmation of her said claims was secured by the active fraud of said Mary Ann Davis, yet said confirmation in no way affected the right, title and interest in said grant of 175 acres on Key Biscayne, held at the date of said confirmation by Antonia Porsila, half sister of Rafael Andreu, being at least an undivided one-half of said grant made by Governor White to her father; that between December, 1824, and the 26th day of May, A. D. 1843, said Antonia Porsila held the equitable title to at least an undivided one-half of the estate and interest granted to Peter Fornells, the legal title being in the United States of America; and thereafter from said 26th day of May, A. D. 1843, until the 17th day of June, 1895, said Venancio Sanchez held the equitable estate to said undivided interest in said lands so granted, the legal title still remaining in the United States; and from the 17th day of June, A. D. 1895, your orators as sole heir at law of said Venancio Sanchez and as his grantees in the recorded deed from Venancio Sanchez set out in paragraph 13 of this Bill, held and now hold the equitable estate to an undivided half interest in said 175 acres on Key Biscayne; that because said Antonia De Barrosa conveyed to Venancio Sanchez an undivided one-half inerest in the grant to Pedro

Fornells, your orators now claim only one-half of said grant, but your orators allege that said Pedro Fornells died intestate, that by the law in force in the territory of east Florida all his property descended to his said daughter Antonia, and none of said property descended to his widow, the mother of Rafael Andreu, and if she took and held any estate therein it was only by reason of the fact that the pre-existing Spanish Law vested in her a garnancial right.

Seventeenth: That the United States held the bare legal title to said lands granted by Governor
14 White to Peter Fornells by cession from the King of Spain, in trust for the grantee under the King of Spain; that by the issuance of the patent from the United States to Mary Ann Davis in A. D., 1896, at which date Mary Ann Davis was dead, intestate, her legal representative, Waters Smith Davis, by descent, and conveyance from his co-heirs, took the bare legal title to said tract of land in said patent described, as Trustee for your orators holding title under Antonia Porcila or Porala, as to at least an undivided one-half of said 175 acres (179 45/100 acres as patented); that from the issuance of said patent until he conveyed to defendant, James Deering, said Waters Smith Davis held the whole legal estate for certain purposes, with a limited interest in the beneficial ownership of the lands patented, as Trustee for himself and for your orators, your orator's estate being an undivided half thereof; that after said conveyance by Davis to the defendant, said defendant took and holds the same estate as trustee for your orators; that since the issuance and delivery of said patent from the United States, the legal estate being in their tenant in common, your orators and said Waters Smith Davis were both cestuis que

trust, and said trustees and cestui que trust as to a limited interest having conveyed to the defendant James Deering, said defendant now stands in like relationship to your orators.

Eighteenth: That at no time during the continuance of said trusts, namely the trust taken and held by Waters Smith Davis and the Trust taken and now held by the defendant, has any money been spent on said property, nor have any improvements been put thereon, and no development thereof has been made; that during the entire period from the confirmation of the grant to Fornells in A. D. 1824 to the present time, said lands (except only the very small plot on which the old light-house now stands, and on which the light keepers house stood, now mostly washed into the sea) have remained a wilderness as left by nature, originally a sand bar, gradually built slightly above the level of the ocean by the growth of mangroves thereon; that the defendant has paid annual taxes assessed on said lands (with other lands on Key Biscayne) since A. D. 1913, and your orators hereby offer to repay said defendant the equitable share of said taxes which, as owners of an undivided half of said 175 acres, they were equitably obliged to pay; and they ask this Court to determine the amount of said annual taxes by reference to a Master, and promise to make tender of such sum as this Court may apportion as their share of such taxes paid by the defendant on said 175 acres or to allow the defendant said ascertained sum in partition proceedings if sent for partition shall hereafter be instituted by your orators or by defendant.

Nineteenth: The defendant will aver in answer to this bill that the claim of your orators is stale; that it

is twenty-two years since the patent issued in the name of Mary Ann Davis was delivered and the trust relationship began; that the secret proceedings and doings of Waters Smith Davis after he was advised by the attorney for Venancio Sanchez in A. D. 1892, of the intention of Mr. Sanchez to apply for the issuance of a patent on said claim of Pedro Fornells took place more than twenty-seven years before the filing of this bill; That Venancio Sanchez and your orators have been guilty of such laches that a Court of Equity will not grant relief because, as defendant will claim, he is a bona fide purchaser for value without notice; but your orators say such charges of laches are in law no defense upon the exceptional facts of the case upon which this bill is founded, and said defendant is not a purchaser without notice, but he purchased after notice; that under the law herein referred to, the confirmation of the claim of Mary Ann Davis in no manner affected the rights of Antonia Porsila or Porala, also called Porcell, the daughter of Marina Fornells, also called Mariana Fudorina, the widow of Peter Fornells, or of her grantee, Venancio Sanchez; that Venancio Sanchez through his attorney made the first move to secure the patenting of said grant to Fornells and in A. D. 1892 advised said Davis by letter addressed to his brother, then deceased, of his intention to secure a quit-claim from the United States for said lands owned in common by said Sanchez and the heirs of Mary Ann Davis, if as said Sanchez then supposed her grantor, Rafael Andreu, had some estate in said grant to Fornells; that said Sanchez did all he then could do to prevent the issue of the patent in the name of Mary Ann Davis; that while the Commissioner of the General Land Office disregarded the Act approved February 8th, 1827, (4 Stats. page 202) requiring claimants applying for patents for confirmed claims in the Territory

of Florida to present a patent certificate, and making it the duty of said Commissioner to ascertain and determine whether such patent certificate had been fairly obtained, yet under the law the rights and interests of said Venancio Sanchez as the owner of the undivided one-half of the lands described in said patent issued in the name of Mary Ann Davis were in no way adversely af-
16 fected by the issuance of said patent; that the patentee held such patented lands as trustee for your orators as co-tenants owning an undivided half thereof, both under said law governing the issuance of patents for confirmed private land claims in East Florida, and under the general law, Section 2447, Revised statutes, providing that such patent only operates as a relinquishment of title on the part of the United States and in no manner precludes a legal investigation and decision by the proper judicial tribunal between adverse claimants of the same land; that after Waters Smith Davis secured said quit-claim from his co-heirs of Mary Ann Davis, and secured the issuance of said patent in the name of Mary Ann Davis, and after he acquired the title of the United States to the three acres reserved for the Cape Florida Lighthouse, said Davis did not take any action to oust your orators from the constructive possession then held by them, which had come to them by descent as to William J. Sanchez and as to all the other Complainants by their duly recorded deed from Venancio Sanchez and which said Sanchez held at the delivery of said deed; that your orators never had actual knowledge that said Davis had parted with the legal title held in trust as aforesaid, and not until immediately prior to the institution of this suit did your orators know by the record of the deed from said Davis that said Davis had transferred to the defendant the legal title of which he was depository under the patent from

the United States; that the defendant James Deering, has never in any manner whatsoever ousted your orators of their constructive possession of the whole of said patented lands; nor did said Waters Smith Davis, nor said defendant ever show acts of possession of the patented lands inconsistent with, and exclusive of the rights of your orators as co-tenants, and such as would amount to an ouster on the part of Davis or the defendant, their co-tenant, and bring to the knowledge of your orators or either of them knowledge that said Davis or said defendant claimed exclusive ownership of said patented lands; and your orators allege that shortly prior to the issuance of said patent said Waters Smith Davis at St. Augustine in the store of said Venancio Sanchez did admit and recognize the rights of said Sanchez in said 175 acres on Key Biscayne, as his co-tenant of said lands; and further allege that the defendant never has taken or held an exclusive adverse possession of said patented lands, or such a possession thereof as is inconsistent with the rights of your orators as his co-tenants.

17 Twentieth: Your orators allege that Waters Smith Davis had actual notice of the claim of your orators, and that their ancestor and grantor Venancio Sanchez, held a vlaid title to an undivided one-half of said grant as said Davis' co-tenant, and constructive notice by the record of said deed from Vanancio Sanchez to your orators, recorded June 17th, 1895, in Book "X", page 262, Dade County Public Records that your orators were his co-tenants; and further allege that said Davis had actual notice of the facts contained in the files and decisions in the office of the Commissioners of the General Land Office relating to the title to said patented lands granted to Fornells, and of the contents of the files in the office of the Surveyor General of Flo-

rida relating to said grant to Pedro Fornells of 175 acres on Key Biscayne and confirmation thereof by the Board of Land Commissioners aforesaid, Exhibit "A" of this Bill; and said defendant had constructive notice of all said files and recorded proceedings and of the recorded deed from Antonio de Barrosa to Venancio Sanchez, and the recorded deed from Venancio Sanchez to your orators other than William J. Sanchez and before he took his deed was bound to take notice that on the face of the grant to Fornells it appeared that his family then consisted of wife and two step-sons; that Raphael Andreu conveyed to Mary Ann Davis only his and his wife's interest in the lands granted by Governor White to Fornells, whatever that might be, and that upon the law and facts Waters Smith Davis held only a beneficial interest in an undivided part of said granted lands with the bare legal title to all said lands patented by the United States as the grant to Peter Fornells as trustee for your orators as to an undivided one-half of said patented lands; that in making a connected chain of title from Peter Fornells to Waters Smith Davis the defendant necessarily had constructive notice of your orator's title to said 175 acres on Key Biscayne, and was affected with constructive notice of all proceedings had in the General Land Office relative to the issuance of the patent to Mary Ann Davis of the proceedings had in the confirmation of the grant to Fornells and of the recorded deeds in the chain of title under which your orators own an undivided one-half of said patented lands;

That in A. D. 1843 Key Biscayne lay in Monroe County; that if the requirement of the Laws of Florida directing that the record of all deeds to land formerly in
the County of Monroe, made a part of Dade
18 County be transcribed in the records of Dade
County has been complied with, then there

existed in the Public records of Dade County when the defendant acquired the interest of Waters Smith Davis in said 175 acres on Key Biscayne, a record of the deed from Antonia de Barrosa to Venancio Sanchez for her undivided one-half of said 175 acres; that if said State Statute has not been complied with then the contents of the public records of Monroe County as to said deed of conveyance duly recorded therein was constructive notice to defendant of the title of Venancio Sanchez, and together with the deed of Venancio Sanchez of the one-half part of the same half interest in said 175 acres to your orators, other than William J. Sanchez recorded in the Public records of Dade County in Book "N" page 262 on June 17, 1895, gave the defendant such notice of the title of your orators as bars any claim that defendant was a bona fide purchaser of said 175 acres without notice.

Twenty First: Your orators say that they have not been guilty of laches and that their grantor, Venancio Sanchez, in his lifetime was not guilty of laches. They are advised by their counsel, who acted as counsel for Venancio Sanchez in his lifetime, and they allege to be facts: (a) That in 1843 said Sanchez by valid deed acquired the estate and interest in said land which the half sister of Rafael Andreu by the same mother had inherited from her father, dead intestate, to the extent of the undivided one-half of said 175 acres on Key Biscayne, being an equal estate to that taken by the mother of Rafael Andreu, the grantor of Mary Ann Davis, as garnancial rights, if said mother was by the pre-existing Spanish law entitled to garnancial rights in said tract of land; that said Sanchez promptly recorded said deed from Antonia de Barrosa, formerly Porcell, also called Porsila in the public records of Monroe County in which

the land lay, in Deed Book "C", pages 328 Et seq; and also thereafter recorded said deed in the public records of St. Johns County in Book "O", pages 562 et seq on the 10th of June, 1843. (b) That after A. D. 1843 and prior to A. D. 1860 said Venancio Sanchez undertook to procure one, J. C. Cleland, one Sampson, Williams, one Dr. W. H. Simmons, and one Joseph Hernandez, all residents of St. Augustine to make settlement on his said lands on Key Biscayne. (c) That prior to the issuance of said patent and while his right to the ownership of the undivided half of said grant to Fornells was undisputed, said Venancio Sanchez made diligent effort to find his grantor Antonia de Barrosa or any of her descendants, to get legal evidence to prove her relationship to said Rafael Andreu, who quit-claimed his interest in said grant to Fornells, to Mary Ann Davis; that his efforts in this line of endeavor were extended, exhaustive, and persistent; that among other sources of information said Sanchez made inquiry of the college of Notaries at Havana, Cuba. (d) That he made inquiries of Laura K. Santo of St. Nicholas, Florida, claiming to be a descendant of Mariana Bellonas, formerly Andreu, for facts to prove Antonia de Barrosa was a sister of Rafael Andreu.

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(e) That said Sanchez, after 1843 and prior to his death, diligently and persistently sought to find in the church records in Havana and St. Augustine, the proof to establish the facts which he, said Sanchez, knew by the claim of Antonia de Barrosa that said Antonia de Barrosa was the sister of said Rafael Andreu by the same mother; that the then insurmountable obstacle to obtaining such proof was the difference in name of said Antonia Porcila and her long absence from St. Augustine, her residence having been in Havana, Cuba; long

before A. D. 1823; that said Sanchez had no clue, and after long continued, persistent efforts could get no clue to lead him to the record proof that his grantor and the grantor of Mary Ann Davis were brother and sister.

(f) That such continued to be the state of the case until July A. D. 1919, when it was discovered by counsel of the late Venancio Sanchez that the index to the Spanish Archives made by Antonio Alvarez, formerly Keeper of the Archives, was still existent. Your orators say they are advised by counsel and they allege to be the fact that Antonio Alvarez, when Keeper of the Public Archives, made an index of all the papers and documents seized by the United States at the change of Flags, constituting the Spanish Archives of East Florida, intending to sell said index to the United States; that said index was for many years lost and was supposed to have been turned over to one Mote, an abstractor of title living in Jacksonville, with other books and papers belonging to said Alvarez, and to have been burned in the big fire in Jacksonville which did burn the books and papers formerly the property of said Alvarez which had theretofore been turned over to said Mote; that most unexpectedly in July, 1919, the index to the Spanish Archives made by said Alvarez was discovered, and on being searched it was found that said index gives the bundle, document and folio of the written instruments in the testamentary proceedings had in the estate of Mariana Tudori, also called Tudorina, the mother of Raphael Andreu, widow of Pedro Fornells, the father of Antonia Porcell, also called Porala; the same as to the grant to Pedro Fornells, of 175 acres on Key Biscayne, and much other information without which the true facts could not be established.

(g) That immediately on getting information from said index to enable the making proof that the grantor of Venancio Sanchez was the half sister of the grantor of Mary Ann Davis, counsel for your orators made search for the original documents pointed out in said index and of the church records, necessary to make full proof, and soon thereafter advised your orators that at last for the first time in many years, the proofs were available to establish the extent and interests that Venancio Sanchez and Mary Ann Davis held under a common title to the 175 acres granted Pedro Fornells on Key Biscayne, Mr. Sanchez owning an undivided one-half thereof, which documentary proofs your orators are ready to produce at the hearing of this cause.

(h) That before any action with respect to the bare legal title held by the United States was had by Mary Ann Davis or her heirs, or by Waters Smith Davis under the claim of Mary Ann Davis, and while he had undisputed ownership of the undivided half of said grant to Fornells, said Venancio Sanchez began proceedings to procure the issuance of a patent for said lands from the United States, who by the Treaty with Spain had declared themselves to be a trustee for those who held the beneficial interest therein.

(i) That never from the time when Venancio Sanchez filed his protest against the issue of said patent in the name of Mary Ann Davis, until his death in A. D. 1899 did said Sanchez desist from his efforts to obtain the proof to establish the relationship of his grantor with the grantor of Mary Ann Davis, and without intermission since A. D. 1899 to the successful outcome as above recited has your orator's counsel, acting in their behalf persisted in search for such proof.

(j) That the proceedings for the confirmation of the claim of Mary Ann Davis printed in American
21 State Papers, Vol. 4, 161-218-263 (Duff Green Edition) upon their face cast suspicion on said claim and are notice sufficient to make inquiry by defendant a duty; that on the fact of said proceedings it appears that Mary Ann Davis had acquired only the right, title and interest of Raphael Andreu in the grant to Pedro Fornells, whatever that might have been; that while the defendant might have been as helpless as said Sanchez was to ascertain the true interest Raphael Andreu had in said grant on June 12, 1824, the date of said Andreu's deed to Mary Ann Davis, yet said defendant and his counsel were bound to know the law governing the title to Spanish Grants of land and to make inquiry, and to search the records of the Land Department of the United States, and such inquiry and search would have furnished sufficient facts to establish that until A. D. 1898 the bare legal title to said grant was held by the United States of America in trust not for Mary Ann Davis and her peers but for the legal representatives of Pedro Fornells; and your orators allege their ancestor and grantor, Venancio Sanchez, and his grantor, the daughter of Pedro Fornells, were such legal representatives, certainly as to one-half of said grant; that after the delivery of said patent Waters Smith Davis took and held under said patent the bare legal title, in trust for the legal representatives of Pedro Fornells as tenants in Common, your orators being cestuis que trust as to an undivided one-half interest in the lands described in said patent.

(k) That said Venancio Sanchez, though using the utmost diligence was never able to procure the necessary evidence to unearth and prove said concealed fraud of

Mary Ann Davis and her husband; that the facts constituting the fraud by which Mary Ann Davis secured confirmation of her claim were first known to your orators and were first discovered by your orators' counsel in July, A. D. 1919, when the existence of Alvarez's Index to the Spanish Archives became known and your orators counsel found therein by search, that among said Archives were the testamentary proceedings in the estate of Pedro Fornells, and of the estate of Mariana Furodina, widow of said Peter Fornells, and it was only after such discovery and because of such discovery that your orators were and are able to produce the legal evidence, that the finding of the Board of Commissioners on said Mary Ann Davis claim that "Fornells and his wife having died, the land descended to Andrews, who sold and conveyed the same to claimant" was
22 fraudulently made, and made to deprive the rightful owner of the lands of their property, which by the eighth article of the Treaty with Spain the United States covenanted to ratify and confirm to the legal representatives of Pedro Fornells; that while the facts which constituted fraud and by which the fraud may be proved in the proceedings of Mary Ann Davis before the Board of Land Commissioners, have just come to light, your orators say that under the treaty of 1819 between the United States and Spain and under the several acts of Congress for the confirmation of private land claims in the Territory of East Florida no duty devolved on them to take any action whatsoever with respect to the bare legal title to said lands granted to Pedro Fornells by Governor White, even though the claim was prosecuted by Mary Ann Davis alone and the grant confirmed to her; that the trust under which the bare legal title to said lands has been held since said grant, up to the filing of this bill, has never been dis-

avowed; that your orators and their grantors have, since the cession of the Floridas by Spain been cestuis que trust of the lands granted Pedro Fornells; that they and their grantors have been continuously in possession of said lands (except the spot on which the old light-house stands and the lightkeeper's house stood) and are now in possession thereof; that the relation of trustee and cestui que trust as to the undivided half of said grant between the patentee from the United States and your orators has continued unbroken by any act on the part of the former trustee Waters Smith Davis, or of the defendant; but so it is your orators now desire to end their character as cestuis que trust; that as they are in law entitled to do they now desire to join with their equitable title, the legal title to their share of said lands granted Pedro Fornells and patented by the United States in the name of Mary Ann Davis; that upon the law and facts peculiar to this case there has been no unreasonable delay in bringing this action, and that they and their predecessors in title have not been guilty of laches in allowing the existing trust to remain outstanding up to this time.

For as much therefore as your orators are without remedy in the premises except in a Court of Equity, and to the end that said defendant James Deering be required to make full and direct answer to this bill, but not under oath, answer under oath being hereby waived;

That said defendant may be decreed to hold the title of the undivided one-half of the grant of 175
23 acres on Key Biscayne made by Governor Enrique White to Pedro Fornells, surveyed by the United States as Section .... in Township 55 South of Range 42 East, patented in the name of Mary Ann Davis by the United States the 23rd day of April A. D.

1896, patent recorded in Volume 19, pages 589 to 593 of the records of the General Land Office, in trust and as trustee for the use and benefit of your orators jointly in the several shares which became vested in your orators by descent and under the deed from Venancio Sanchez, recorded in Deed Book "N", page 462, Public Records of Dade County; that this Court will construe the legal effect of the grant made to Venancio Sanchez by Chapter 791 Laws of Florida and determine whether the full title to the strip of land lying upon the Bay of Florida as far as the edge of the Channel within the extended lines of the survey made by the United States as the grant to Peter Fornells, which was vested in Venancio Sanchez by the Act of the Legislature of Florida, approved December 27th, 1856, known as the Riparian Act is so connected with the bare legal title which passed out of the United States by the patent that the defendant should make a deed to the complainant, William J. Sanchez. That if it be found that under the several statutes named in the first paragraph of this bill and under the treaty between the United States and Spain aforesaid your orators' undivided one-half interest in said grant to Peter Fornells requires a deed to vest in them the full title to their respective shares in said lands patented by the United States as the grant to Peter Fornells and the riparian rights vested in Venancio Sanchez as the owner of an undivided one-half of said lands on Dec. 27th, A. D. 1856, then that the defendant James Deering be decreed to convey to your orators an undivided one-half interest in said grant as patented by the United States in the name of Mary Ann Davis, each of your orators taking the share which they are entitled to under said Venancio Sanchez.

And that your orators may have such other, further and different relief in the premises as equity may require, and to Your Honor may seem meet.

May it please Your Honor to grant to your orators the United States writ of subpoena in Chancery out of and under the seal of this Court, directed to said defendant James Deering, commanding him to appear in this Honorable Court on a day therein named, and true, direct and perfect answer make to this bill of
24 complaint, but not under oath, answer under oath being hereby expressly waived, and to stand to and abide by and perform such order and decree in the premises as to Your Honor shall seem meet.

And your orators will ever pray, etc.

W. W. DEWHURST,
Solicitor for Complainants.

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42 MOTION TO DISMISS BILL OF COMPLAINT.

In the District Court of the United States, for the Southern District of Florida, In Chancery.

E. C. F. Sanchez, et al, Complainants,
vs.
James Deering, Defendant.

Comes now the defendant, James Deering, and moves the Court to dismiss the bill of complaint herein on the following grounds:

1. The bill of complaint is without equity and does not state facts sufficient to entitle the plaintiffs to any relief.

2. The facts stated in the bill show that the alleged claim is a stale claim, and that the cause of action ought not to be maintained.

3. The bill shows on its face that the plaintiffs have been guilty of laches, and that the cause of action cannot be maintained in equity and good conscience.

4. Whereof the defendant prays that the bill of complaint herein be dismissed.

HUDSON, WOLFE & CASON,
Attorneys for Defendant.

Filed June 14, 1920.

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43 In the District Court of the United States, in and for the Southern District of Florida.

E. C. F. Sanchez, et al,
vs.
James Deering.

W. W. Dewhurst, of Saint Augustine, Florida, Complainant's Solicitor.
Hudson, Wolf & Cason, of Miami, Florida, Defendant's Solicitors.

CALL, District Judge:

In this cause the bill of complaint was filed April 7th, 1920, praying that the defendant be decreed to hold the legal title to an undivided half interest in the real estate described in the bill as the trustee for the complainants and for other relief.

The basis of the suit is a grant by Governor White, of 175 acres of land upon Key Biscayne, (Key Buskun) in Dade County, Florida, while the Floridas were under the Dominion of Spain.

The bill shows the grant to Pedro Fornells on January 18th, 1805; the memorial of May Ann Davis to the commissioners for confirmation of the grant July 23rd, 1824, claiming title through a deed from Rafael Andrue, a step-son of Pedro Fornells, executed July 12th, 1824.

The action of the commissioners confirming this grant to Mary Ann Davis was approved and confirmed by Act of Congress February 8th, 1827. The survey of the Surveyor General was made in 1847 segregating the 175 acres from the Public Domain. On June 30th, 1827, Mary Ann Davis and her husband deeded to the United States three acres of the tract on which the Cape Florida Light House was built; this light House was subsequently abandoned and in 1903 the three acres was conveyed to Waters S. Davis; June 3rd, 1893, the heirs of Mary Ann Davis quit claimed their interest to Waters S. Davis. April 23rd, 1896, patent for these lands was issued to Mary Ann Davis the confirmee, but was not delivered until 1898 on account of a protest filed by Venancio Sanchez, which protest was overruled by the Surveyor General, the Land Commissioner and the Secretary of the Interior.

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June 28th, 1913, Waters S. Davis, one of the heirs of Mary Ann Davis, conveyed these lands to the defendant.

The complainants design their title to one half undivided interest in and to said lands through a deed executed by the attorney in fact of Dona Porsila de Barrosa, widow, and daughter of Pedro Fornells, and her children, residents of Cuba, to Venancio Sanchez, dated May 26th, 1843.

The bill further alleges certain transactions between Sanchez and the husband of Mary Ann Davis, looking to the division of the land into lots and settlement of same, which were not consummated, as well as a conference between Sanchez and Waters S. Davis looking to a buy or sell proposition, which resulted in failure to arrive at an agreement; the subsequent application of Davis for the patent and the protest filed by Sanchez against the issuance of same and the proceedings thereunder; and the issuance of the patent in 1898, as above noted. A number of allegations are made to show that the complainants, nor their predecessor in title, were guilty of laches in asserting their claims in the Courts.

The defendant moved to dismiss the bill on the grounds that the bill showed that complainants were guilty of laches and the action ought not to be maintained in equity and good conscience.

The 8th Article of the Treaty by which the Floridas were ceded to the United States as copied in
45 the case of United States vs. Perchman, 7 Peters 88, (32 U. S. 87) is as follows: "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty or by his lawful authorities in the Territories ceded by his Majesty to the United States", (the English portion says "shall be ratified and confirmed" the Spanish "shall remain ratified and confirmed") "to the persons in possession of the lands to the same extent that the same grants would be valid if the Territories had remained under the Dominion of his Catholic Majesty."

Where the lands granted had been officially surveyed and segregated from the Public Domain prior to the cession, the title had vested, and as I understand the language of Chief Justice Marshall in U. S. vs. Perchman,

Supra., the United States took no title to same by the treaty of cession. If, however, the grant was of a certain number of acres of land, as was the case in the grant involved in this case, undefined and incapable of identification, then title became perfect only when the granted land was surveyed, thus segregating it from the Public Domain, and a patent issued. Langsdean vs. Hanes, 21 Wall. 531.

I am of opinion therefore that it is from the issuance of the patent that the title became perfect in this case, although the survey was made and approved in 1847.

It is therefore from 1896 or 1898 that I will consider the question of laches.

The bill shows that Vanancio Sanchez lived until 1899, something like a year after his protest against the issuance of the patent had been overruled by the Secretary of Interior and when he recognized that Davis was claiming the whole acreage. That no steps were taken by him to assert his claim to the undivided half interest, because of the difficulty in discovering record evidence to establish the title of his grantors, I deduce from the allegations of the bill. He was charged with notice that in 1893 the grantor of the defendant had received a conveyance of the three acre tract, theretofore conveyed to the United States by his predecessors
46 in title; these complainants must be charged with notice that in 1913 this defendant received his conveyance to these lands, the entire title, not a half interest, and yet no steps taken legally to assert their claim.

It does not seem to me that because the defendant may be charged with notice of the claims of complainant that would excuse the delay from 1896 or 1898 to 1920 by the complainants in asserting the claim made in the bill.

Venancio Sanchez at the time he made his protest to the land Department against the issuance of the patent at the instance of Davis that Davis' claim was antagonistic to his.

Any laches chargeable to their predecessor in title to the complainants is chargeable to them and their right to maintain the suit must be tested by the right of their predecessor, had he remained alive and retained the title; and had he remained alive and waited until 1920 to assert his rights against this defendant, certainly a Court of Equity would not entertain the suit.

I am of opinion that the defendant occupies the position of a bona fide purchaser for value and that the complainants are barred by their laches from maintaining this suit.

A Decree will be entered granting the motion to dismiss the bill.

RHYDON M. CALL,
Judge.

At Jacksonville, Florida, March 28th, 1923.

Filed March 28th, 1923.

47 DECREE OF DISMISSAL.

In the District Court of the United States for the Southern District of Florida. In Chancery.

E. C. F. Sanchez, et al, Complainants,

vs.

James Deering, Defendant.

Now on this day came on for consideration the bill of complaint heretofore filed in this cause and the defendant's motion to dismiss the said bill.

The said motion to dismiss having been argued by Hudson, Wolfe & Cason, as solicitors for the defendant, and W. W. Dewhurst, Solicitor for the Complainants, and briefs having been submitted by both parties and the Court having considered the said bill and motion and arguments of counsel;

It is considered ordered and decreed that the bill of complaint be, and the same is hereby, dismissed at complainant's costs.

Done and ordered at Jacksonville, Florida, this 4th day of April, 1923.

RHYDON M. CALL,
Judge.

Filed Apr. 4, 1923.

48 In the District Court of the United States for the Southern District of Florida.

E. C. F. Sanchez, Eugene E. Sanchez, Mabel Sanchez, Mercedes A. Sanchez, William J. Sanchez, Appellants,

vs. In Chancery.

James Dearing, Appellee.

Now comes E. C. F. Sanchez, Eugene E. Sanchez, and William J. Sanchez, Complainants, and say that in the record and proceedings in the above entitled cause had therein there is manifest error; that the Court erred in:

1. Sustaining the motion of the Defendant to dismiss the bill;

2. Dismissing the bill of complaint.

Wherefore Complainants pray that said decree be reversed.

W. W. DEWHURST,
Solicitor for Complainants and Appellants.

Filed Sept. 28, 1923.

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53 In the District Court of the United States in and for the Southern District of Florida.

United States of America,
Southern District of Florida.

I, EDWIN R. WILLIAMS, Clerk of the District Court of the United States of America, in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, hereby certify that the foregoing typewritten pages numbered from 1 to 52 inclusive, comprise a true and correct transcript of record in the case of E. C. F. Sanchez, et als Appellants, vs. James Deering, Appellee, prepared according to directions filed in this office, as the same appears from the records and files of this Court.

In witness whereof, I hereunto set my hand and affix the official seal of this Court at Jacksonville, Florida, this 23rd day of November, A. D. 1923.

(Seal) EDWIN R. WILLIAMS.

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

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IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4252

E. C. F. SANCHEZ et als., Appellants,

versus

JAMES DEERING, Appellee

Appeal from the District Court of the United States for the Southern District of Florida

William W. Dewhurt for Appellants.
F. M. Hudson (F. W. Cason on the brief), for Appellee.

Before Walker and Bryan, Circuit Judges

OPINION—Filed March 18, 1924

BRYAN, Circuit Judge:

In 1913 the appellee acquired the legal title to 175 acres of land on Key Biscayne, in Dade County, Florida. In 1920 the appellants filed their bill to impress this title with a trust in their favor to the extent of an undivided half interest. The District Court, upon appellee's motion, dismissed the bill on the ground that the relief sought was barred by laches.

The opinion of the District Judge is reported in 288 Fed. 412. It is preceded by a statement of the contents of the bill, which is correct as far as it goes, except that where the names "Waters S. Smith" and "Mary Ann Smith" occur it was obviously the intention to refer to Waters Smith Davis and Mary Ann Davis. The bill also contains averments, which appear to us to be material, to the effect that about 1840 the husband of Mary Ann Davis sought to interest Venancio Sanchez in developing Key Biscayne, after which said Sanchez discovered that Mrs. Davis owned only an undivided half interest; that he then learned, in some way not disclosed, that the owners of the other half interest lived in Cuba, and soon thereafter went to Havana, met Antonia Porsila and purchased her half interest; that Sanchez was acquainted with Raphael Andreu, who lived in St. Augustine; and that Mary Ann Davis died about the year 1885.

July 23, 1824, Mary Ann Davis made application to the commissioners appointed pursuant to the Acts of Congress of May 8, 1822, 3 Stat. 709, and March 3, 1823, 3 Stat. 754, for confirmation to her of the grant originally made to Pedro Fornells. In support of this application she represented that she had purchased from Raphael Andreu, the son and heir of Fornells' widow and hier. December 21, 1824, the commissioners confirmed the grant to her. 4 American State Papers, (Duff Green Edition) 161, 218, 275; and,

January 1, 1825, reported their action to the Secretary of the Treasury, who, February 21, 1825, referred the report to Congress. Id. 83, 157, 169. The Act of Congress of February 8, 1827, confirmed all claims "contained in the reports, abstracts, and opinions, of said commissioners, which have been transmitted to the Secretary of the Treasury, according to law, and referred by him to Congress on the 21st. of February, 1825." In view of these proceedings and this confirmatory Act of Congress, we are of opinion that the legal title vested in Mary Ann Davis in 1847, when the official survey was made, and did not remain in the United States until issuance of the patent in 1898. In Langdeau v. Hanes, 21 Wall. 521, it is said:

"A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit claim from the government. 'A confirmation,' says Sheppard in his Touchstone of Common Assurances,' is the conveyance of an estate, or right, that one hath in or unto lands or tenements, to another that hath the possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged.' If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated."

It is true that this case does not relate to land ceded by Spain to the United States under the Treaty of 1819; but the same rule is applied to a Spanish grant in Wilson Cypress Company v. del Pozo y Marcos, 236 U. S. 635. The failure to assert whatever interest the appellants had continued for 50 years prior to the issuance of the patent, and in considering the question of laches, the period of time involved extends over 73 years, or from 1847, the date of the survey, to 1920, when the bill was filed.

Before Venancio Sanchez, under whom the appellants claim, obtained his deed in 1843 from Antonia Porsila, who it is asserted inherited from her father, Pedro Fornells, a half interest in the land in dispute, he knew that Mary Ann Davis was claiming to be the owner in her own right of the entire interest in the property. The bill does not aver that Mary Ann Davis ever acknowledged or recognized that she held the title to a half interest in trust. The utmost that is asserted in this connection is that her husband did not dispute the claim of Venancio Sanchez; but evidence to bind the estate of a deceased person is inadmissible. The averment that Waters S. Davis offered to sell to Venancio Sanchez, or to buy from him, when taken in connection with the averment that immediately after his proposition was declined he applied for a patent, and resisted the claim of an adverse interest, is not sufficient to support the inference that he acknowledged or recognized that he held any part of the title as trutee. Venancio Sanchez knew

Antonia Porsila, Mary Ann Davis and Raphael Andreu, all of whom were living when he purchased his adverse claim, which if valid should have been established while the witnesses who knew about it were living. Mary Ann Davis lived until 1885. and it was not until long after her death that her title was contested. The long delay and the death of material witnesses appear on the face of the bill, and, if they constitute laches, the bill may be dismissed without requiring an answer. The appellants realize this, and set up as excuses the constructive notice afforded by the recorded deed from Venancio Sanchez to them, and their inability to trace the relationship between Antonia Porsila and Raphael Andreu until discovery in 1919 of an index to the Spanish Archives. The recorded deed to the appellants would only have charged the appellee with notice of a claim which apparently had been abandoned for a period of 50 years; and the index would only have furnished information already possessed by Venancio Sanchez at the time he purchased the Claim now sought to be enforced. The laches is made up, therefore, of a delay of 73 years and the loss of evidence by the death of witnesses which cannot in the nature of things be now available to the appellee. We are of opinion that it is too late now to enter into the merits of a claim of title which could have been asserted and enforced if good, and rejected if bad, while the witnesses who knew about it were living and could have testified with reference to it.

The decree is affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT

Extract from the Minutes of March 18th, 1924

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, E. C. F. Sanchez, and others, and the sureties on appeal bond herein, William J. Sanchez and John T. Dismukes, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed June 13th,1924

E. C. F. Sanchez, Eugene E. Sanchez, Mabel Sanchez, Mercedes A. Sanchez and William J. Sanchez, Appellants, in the above entitled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit: that judgment therein has been rendered on to wit the 18th day of March, 1924, affirming the decree of the District Court of the United States for the Southern District of Florida and that the matter in controversy in said suit exceeds the sum of $3,000 besides costs: that this cause is one in which the United States Circuit Court of Appeals for the Fifth Circuit has not final jurisdiction: That it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said Appellants pray that an appeal be allowed them in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit to send the record of proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said Appellants may be reviewed and if error be found correct it according to laws and customs of the United States.

(Signed) William W. Dewhurst, Solicitor and Counsel for Appellants.

Appeal allowed and bond fixed in the sum of Five Hundred Dollars, conditioned as the law directs this the 10th day of June, A. D. 1924.

(Signed) N. P. Bryan, Judge of the Circuit Court of Appeals, Fifth Circuit.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 13th, 1924

The Appellants in the above entitled cause in connection with their petition for appeal herein present and file therewith their Assignment of Errors as to the matters and things in which they say the decree of the said United States Circuit Court of Appeals for the Fifth Circuit, dated to wit March 18, 1924, is erroneous, to wit:

(1) The Court failed to understand the nature of the case made by the bill.

(2) The Court in its opinion has stated and decided a case other than the case made by the bill and different therefrom.

(3) The bill of complaint presented for decision the effect of a patent by the United States of an inchoate concession for 155 acres of undefined land made by Spain before the transfer of the Floridas to the United States, unsurveyed under Spain, the legal title to which passed to the United States under the Treaty of 1819, which concession was confirmed under the acts of Congress approved May 8, 1822, and February 28, 1827, and the law applicable to such a concession so confirmed. The Court in its opinion and decree has applied to the case the laws applicable to the confirmation of grants of land the legal title to which was never in the United States.

(4) The bill made a case where the documentary evidence of title showed an incomplete title to land, without boundary lines, unsegregated from the Royal Domain, but the Court applied the law applicable to a claim to land with definite boundaries to which a Royal Title had issued, and which was private property before the cession of the Floridas by the King of Spain to the United States.

(5) To a claim to lands confirmed by an act of Congress which expressly provided that confirmed claims should be surveyed, plats and certificates of survey thereof made, one to be filed in the office of the register for the district where the land lay and the other given the claimant: Making it the duty of the register to issue patent certificates to claimants entitled thereto, which patent certificates are to be presented to the Commissioner of the General Land Office "and if it shall appear to the satisfaction of the Commissioner of the General Land Office that the certificates have been fairly obtained and correspond with the transcript submitted to the Secretary of the Treasury and the plat returned by the surveyor, patents shall be granted" etc. The Court has misapplied the law applicable to the issuance of a patent upon a claim confirmed under a law which in terms prescribed that the person whose claim is confirmed whenever his claim shall have been located and surveyed shall be entitled to receive a certificate stating that the claimant is entitled to receive a patent by virtue of an act of Congress, which certificate shall entitle the party to a patent.

(6) The Court erred in holding that upon the allegations made in the bill as of fact in clear and definite terms as admitted by the motion to dismiss, without suggestion that the facts were not well pleaded, the defense of laches could be presented by motion to dismiss.

(7) The Court erred in finding that the bill on its face showed such long delay and death of material witnesses as constituted laches.

(8) The Court erred in affirming the decree of the District Court appealed from.

(9) The Court erred in not reversing the decree of the District Court appealed from.

(Signed) William W. Dewhurst, Solicitor and Counsel for Appellants.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages unmbered from 44 to 55 next preceding this certificate, contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4252, wherein E. C. F. Sanchez, et als., are appellants, and James Deering is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 43 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscride my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 1st. day of July, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court or Appeals, Fifth Circuit. (Seal United Circuit Court of Appeals, Fifth Circuit.)

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 1923

E. C. F. SANCHEZ et al., Appellants,

vs.

JAMES DEERING, Appellee

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANTS OF PARTS OF RECORD TO BE PRINTED—Filed July 14, 1924

The Appellants intend to rely on points which are set forth in the following portions of the record:

Bill of Complaint;

Motion of Defendant to dismiss the bill of Complaint;

The opinion of the District Court and the decree of the District Court;

Assignment of Errors to the decree of dismissal of the District Court;

Opinion of the Circuit Court of Appeals;

The decree affirming the decree of the District Court;

The Assignment of Errors to the Decree of the Circuit Court of Appeals,

and counsel for Appellants deem only so much of the transcript of the record in said cause on file in the Supreme Court as above set forth is necessary for the consideration of said cause and request that the Clerk shall print those parts only.

William W. Dewhurst, Solicitor for Appellants.

Service of the above suggestions accepted this 5th day of July, 1924.

F. M. Hudson, Solicitors for Appellee.

[File endorsement omitted.]

Endorsed on cover: File No. 30,501. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 536. E. C. F. Sanchez, Eugene E. Sanchez, Mabel Sanshez, et al., appellants, vs. James Deering. Filed July 14th, 1924. File No. 30,501.

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In the Supreme Court
of the United States

E. C. F. SANCHEZ, et al.,
Appellants,
vs.
JAMES DEERING,
Appellee.

No. 536.

STATEMENT OF THE CASE

For the sake of brevity we ask the Court to accept the statement of the case made by the District Judge reported in 288 Federal Reports, page 412 et seq.

The appeal from the decree of Judge Call presented chiefly a question of pleading, and required a construction of Equity Rule 29.

The Court of Appeals was asked to consider and determine whether the defense of laches may be made to appellants' bill by a motion to dismiss, which admits the truth of the statement of material facts alleged excusing delay of 22 years in seeking the aid of a Court of Equity during the first 15 years of which period their ancestor and they were without obligation to apply to any Court to maintain or secure their right and interest.

Without referring to Rule 29 or the cases cited construing this rule that Court avoided appellants' contention by the statement of an admitted general rule of equity practice, misapplied to the statement in the bill of complaint of the facts of this case.

The opinion states "The long delay and death of material witnesses appear on the face of the bill, and if they constitute laches the bill may be dismissed without requiring an answer."

We reply—(a) the long delay was sufficiently excused by material facts alleged in the bill, and admitted by the motion to dismiss: (b) the death of material witnesses does not appear on the face of the bill. Appellants' case and appellee's defense is not dependent upon the testimony of witnesses. Appellant's case rests wholly upon documentary proof: the record of marriages and births which could not be found for a long period of years, discovered immediately before the bill was filed.

The simple case which was presented to the Circuit Court of Appeals has become a case of great importance, and requires a more extended argument and citation of authorities because the opinion of the Circuit Court of Appeals is based upon the decision of this Court in Wilson Cypress Company vs. Marcos, 236 U. S. 635.

Record page 45.

Disregarding the express terms of the statute recited in the opinion as the law under which the grant to Pedro Fornells was confirmed—overlooking the decisions of the highest courts of Louisiana and Alabama construing acts of Congress in identical and practically identical words used in the Act of February 8, 1827, although the same was presented by brief and argument in extenso, the Court of Appeals followed this Court's reasoning and opinion in the case reported in 236 U. S. 635.

Judge Call refused to follow the opinion of this Court in the Marcos case and in his opinion in this case says: "I am of opinion therefore that it is from the issuance of

the patent that the title became perfect in this case although the survey was made and approved in 1847." Sanchez v. Deering, 288 Fed. text 415.

The Court of Appeals though it sustained Judge Call's decree bases its opinion upon a directly contrary view of the confirmatory law; makes the legal title vest 51 years earlier than in law and fact it did vest; and counts as the period from which the question of laches is to be determined a date more than 50 years before the United States parted with the legal title to the patented lands ceded by the Treaty of 1819 with Spain.

The Court cites the rule declared in Langdeau v. Hanes, 21 Wall 521, text 530, then misapplies it to a case where the fee passed to the United States by cession from Spain, and based its action on the opinion of this Court. Record page 45.

The primary duty of counsel is therefore to satisfy this Court that it fell into error in its reasoning and opinion in the case of Wilson Cypress Company vs. Marcos, reported in 236 U. S. 635. This duty necessitates a great extension of the argument and citation of cases otherwise irrelevant to the issues made by the pleadings.

The Court's special attention is called to the fact that the Marcos case was not finally decided on its merits. One matter of law only was decided—erroneously we are convinced—and the case left open upon remand.

Appellants do not collaterally attack the judgment rendered in the Marcos case; that stands as the law of that case until reversed on direct appeal.

When that case comes before this Court again we are mistaken in our estimate of the character of the members of this Court if they shrink from an acknowledgment of a plain error of judgment, or fail to recognize that the dignity and honor of this great Court requires that it shall alter its opinions where a plain mistake has been made.

The reasoning on which the one point decided in the Marcos case was based should not be extended to any independent case. It is contrary to the law as decided in numerous other cases in this Court, and contrary to the plain meaning of an Act of Congress as construed by the highest courts of Alabama and Louisiana, and by the Attorneys General of the United States, and the Land Department in numerous opinions.

THE MARCOS CASE

The Marcos case presented for determination the title under a patent from the United States issued in 1895 to a tract of 5486 acres, claimed under a concession or inchoate title made by the Governor of East Florida to Miguel Marcos in 1815, on his petition for a grant of 5,500 acres of land. The concession was endorsed on the petition, of the quantity prayed for, wholly without descriptive boundaries or definite location, and as stated in the petition of Marcos' widow filed with the Commissioners for Settlement of Private Land Claims had never been surveyed. See Vol. 4 American State Papers (Gales & Seaton Ed.), pages 697-705; Duff Green ed. p. 471 et seq. Record in case of Wilson Cypress Company vs. Marcos, pages 114-115.

As recited in the patent this concession was confirmed by the Act of Congress Feb. 8, 1827 and May 23, 1828, to the extent of a league square.

Exercising the judicial powers vested in him by the Act of Feb. 8, 1827, Robert Butler, Surveyor General of Florida, had surveyed as public land all of Township 19 S., Range 28 E. in December, 1847. Record in case 135 October Term 1914, page 1026.

The 16th section in this township vested in the State of Florida on its admission into the Union in 1845. The State of Florida selected as Swamp lands approximately two thousand acres in Sections 22, 23, 24 and 25, in July

1856. This selection approved July 17, 1856, by John Westcott, Surveyor General, was confirmed by the Act of Congress approved March 3, 1857, and the land patented to the State of Florida March 14, 1872, as public lands granted under the Swamp Land Act of Sept. 28, 1850.

In 1851 Benjamin Putnam, Surveyor General of Florida, without authority of law approved a survey of the private claim of Teresa Rodriguez (widow of Marcos) which was laid down on the plat of the township surveyed as public lands approved in 1848, which covers the school section and the Swamp land selections in township 19 Range 28. This approved survey of the unconfirmed claim of Teresa Rodriguez is marked "diagram to be appended to Township 19, Range 28." Record case 135, October Term 1914, page 1027.

The records of the General Land Office establish that as late as 1894 the official plats in that office did not show the claim of Teresa Rodriguez. Record in Wilson Cypress Co. v. Marcos, pages 847-848. The heirs of Marcos plaintiffs in the trial court based their claim of title wholly on the patent from the United States. Wilson Cypress Company claimed under a tax sale made about the date the State of Florida took its patent for the lands selected and confirmed by the Act of March 3, 1857, as swamp lands. To sustain its tax title defendant in the trial court and on appeal contended that the concession to Marcos was a perfect grant, that the lands were private property before the cession of the Floridas—that it was confirmed without a survey and to its full extent and needed no patent; that the title was vested in the Spanish grantee prior to the date of tax sale. The patent recited that the claim was confirmed not to exceed a league square and "was confirmed by the Act of Congress of the 8th of February, 1827. See Statutes at Large Vol. 4, p. 202." Record in case 135 Oct. Term 1914, page 838 and 839.

This Court determined the question of date when the land became taxable upon principles which govern confirmed Mexican grants under the laws of 1851 and 1860, where the essential and substantive acts are only the confirmation and the survey. Under these statutes the patent is only evidence of a pre-existing title made perfect by those two acts. By the express words of the Florida statutes a judicial duty is to be performed by the Commissioner of the General Land Office before the confirmee is entitled to a patent.

The errors into which the Court fell are

(a) It assumed the character of the Marcos grant to be a perfect title, whereas it was established to be a first concession only. The lands described in the patent passed to the United States under the Treaty.

United States vs. Wiggins, 14 Peters, text 334-348-350.

(b) It accepted the statement of the Secretary of the Interior that "a league square" exceeded 5,500 acres.

(c) It assumed the grant was a confirmed grant. It was an unconfirmed grant after May 26, 1831.

The grant was confirmed to the extent of a league square only. By failure of the confirmee to comply with the Act of May 23, 1828, the confirmation failed, and the lands after May 26, A. D. 1831, were deemed to be public lands.

Menard v. Massey, 8 How. 293, text 308.
Mitchell v. Furman, 160 U. S. 402, text 438-439.
Estrada v. Murphy, 19 Cal., text 272.
United States v. Young, 8 Peters 484.

Unfortunately the case last cited was not on the briefs before the court. Council cited United States vs. Mitchell, 15 Peters, text 57-64-90-91 and United States vs. Perot, 98 U. S. 428 to show that the term "a league square" as used in the Act of May 23, 1828 was 4,428.68 acres. The latter case recites a letter dated 20th February, 1855, from the Commissioner of the General Land office to Mr. Justice Catron stating that it was the practice of the Land Office to consider a league equivalent to 4,340 27-100 acres.

The case of United States vs. Young is conclusive of the sole question decided in the Marcos case. The United States appealed from a decree of the Superior Court of East Florida confirming to Young a grant of 5,000 acres of land. The Superior Court took jurisdiction and decided the cause; the United States Attorney contested the case on its merits in the Court below, and from an adverse decree took an appeal upon the merits to this Court, which in A. D. 1834 considered the questions of fact and law, and on the merits confirmed the grant.

Without taking any notice of the allegations of the bill (paragraphs 15-16-19) or the cases cited as above set out this Court accepted the statement found in the opinion rendered by the Secretary of the Interior in the case of Private Land Claim of Teresa Rodriguez, Land Decisions Vol. 15, No. 341, February 12, 1894, that its decisions "with reference to Florida and Louisiana private land claims has failed to reveal any decisions" on the question of "What did Congress mean by the expression 'a league square.' "

The meaning of the term "a league square" was settled sixty years before when this Court decided the case of United States v. Young, supra.

This Court in the Marcos case wholly overlooked Sections 7 and 8 of the confirmatory Act of February 8, 1827. No reference is made in its opinion to this Act

of Congress, although it is recited in the patent (record in case 135 October Term 1914, page 839), and is controlling upon the question of the right of the Surveyor General of Florida to survey the lands described in the patent as a private claim, and of the date when the land became taxable and prescriptable.

See Section 6 of the Act of May 8, 1822, Section 7 of the Act of March 3, 1823, and especially Section 7 of this Act of 1827.

It accepted as an official plat the township plat marked "diagram to be appended to township 19 range 28," although it was established that the records of the General Land Office as late as 1894 contained no other official plat than the plat approved in 1847, showing all the township to be public lands.

It wholly overlooked the fact that upon the approval of the survey of township 19 range 28 in 1847 as public land the 16th section vested in the State of Florida as school land.

Without referring to any of them, and without in terms modifying any of them the Court overturned a uniform series of decisions of this Court from 8th Peters to 16th Howard, which for more than seventy years had been recognized as having established a rule of property, so that now neither the Land Department nor the local practitioner knows what the law is with respect to imperfect Spanish grants. If the principles established by the cases appealed from the Old Superior Court of East Florida are followed, one is met by the Marcos case. If this Court's decision in the Marcos case is followed, one is confronted by the uniform decision in the cases brought to this Court from the Superior Court of East Florida as also by the case of Mitchell v. Furman, 180 U. S. 402.

THIS COURT IN THE MARCOS CASE FAILED TO NOTICE THE LAWS UNDER WHICH THE FLORIDA CLAIMS WERE SETTLED

Special attention of the Court is called to the Act of February 8, 1827, under which the Marcos claim was confirmed. The Act is entitled "An Act to Provide for the Confirmation and Settlement of Private Land Claims in East Florida and for Other Purposes."

Section 7 required the keeper of the public archives to furnish the surveyor of public lands a description of each claim confirmed—"which shall specially designate the quantity, locality and connection of such claim and where the confirmation may have been made on a grant or survey, a copy of the courses and distances contained in such grant or survey and the date of the survey or grant," and it shall be the duty of the surveyor of public lands in Florida to cause, under such instructions as he may receive from the Treasury Department, the said claims to be surveyed and connected with the township lines and public surveys and to give them their proper township and section numbers agreeable to such description, and he shall make separate plats and certificates of survey of the same, *one of which shall be returned to the register of the land office* for the district in which the land may lie *and the other* shall be delivered to the claimant; but it shall be the duty of the surveyor to withhold his certificate if he have reason to believe that the lands confirmed are other lands than those intended to be confirmed, or if it shall appear that *the survey under which the land is claimed* has been made subsequent to the date of the survey under which the claim was confirmed."

Section 8 enacted that so soon as said tracts of land shall have been thus surveyed and the surveys thereof returned to the office of the proper register, it shall be the duty of such register to issue certificates in favor of the claimants entitled thereto and *"if it shall appear to*

the satisfaction of the Commissioner of the General Land Office that the certificates have been fairly obtained and correspond with the transcripts transmitted" to the Secretary of the Treasury and the plat returned by the surveyor, patents shall be granted in like manner as provided by law for the other public lands of the United States.

As Sections 7 and 8 of this Act under which the Marcos claim was recommended for confirmation are almost in the same language as the Acts for the settlement of private land claims in the Territory of Louisiana which have been construed by the Attorney General and the Courts, we deem it proper to print certain sections of those Statutes.

Section 3, Act of April 12, 1814, Stats. at L., page 122, an act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri.

It shall be the duty of the several registers of the Land Office and the recorder of land titles in the State or Territory aforesaid with whom the claims in their respective districts have been entered which are confirmed by this Act in all cases where the land has not been surveyd according to law to make out for the proper deputy surveyor of the district in which the land lies, an order of survey for each tract of land confirmed under this act, with a proper description of the tracts to be surveyed wherein the quantity, locality, boundaries and connection when practicable with each other, and the tracts which have been heretofore confirmed, shall be stated and on the return of the plat or survey, or, where an order of survey is not necessary, the said register or recorder of land titles shall on application for that purpose, make out for each claimant entitled thereto by the provisions of this Act a certificate of confirmation directed to the Commissioner of the General Land Office and if it shall appear to the satisfaction of said commissioner that such certificate shall have been fairly obtained according to the true

intent and meaning of this Act, then and in that case patents shall be granted in like manner as is provided by law for the other lands of the United States, etc.

Act for adjustment of claims to lands in the district east of New Orleans, approved March 3, 1819, 3 Stats. at L., 528.

Section 12. The Register and Receiver * * * shall make out to each claimant entitled in their opinion thereto, a certificate according to the nature of the case, under such instructions as they may receive from the Commissioner of the General Land Office, and on presentation at the General Land Office of such certificate for a confirmed claim or for a donation according to the provisions of this Act, and where it shall appear to the satisfaction of the Commissioner of the General Land Office that the certificate has been fairly obtained according to the true intent and meaning of this Act, then and in that case a patent shall be granted in a like manner as for other lands of the United States.

Section 2 of the Act of April 18, 1814, 3 Stats. at L., page 139 of the Act concerning certificates of confirmation to claims to land in the State of Louisiana.

That so soon as said tracts of land shall have been thus surveyed and the surveys thereof returned to the office of the proper register, together with the original certificates of the commissioners, it shall be the duty of said register to issue certificates in favor of the claimants entitled thereto, which he shall transmit to the Commissioner of the General Land Office, and if it shall appear to the satisfaction of said commissioner that the certificates have been fairly obtained and correspond with the transcript heretofore transmitted to the Secretary of the Treasury, and the plats returned by the surveyors, patents shall be granted in like manner as is provided by law for the other public lands of the United States.

Act of May 23, 1828, entitled "An Act Supplementary to the Several Acts Providing for the Settlement and Confirmation of Private Land Claims in Florida," by its first section confirmed the claims contained in the reports of the commissioners and the reports of the register and receiver to the extent of the quantity contained in a league square, to be located by the claimants within the limits of such claims or surveys filed before the commissioners, and within the bounds of the original grant, in quantities of not less than a section to be bounded by sectional lines.

Section 2 enacted that not more than a league square shall be confirmed within the bounds of any one grant, and no confirmation be effectual until the interested parties file with the register and receiver a full release of all claim to the residue contained in the grant, "and thereafter the excess in said grant shall be liable to be sold as other public lands of the United States."

Section 3 prescribes that the confirmations shall operate only as a release of any claim had by the United States.

Section 6 prescribed that all claims containing a greater quantity of land above a league square, not rejected by the commissioners, shall be received and adjudicated by the Judge of the Superior Court upon the petition of the claimant, according to the rules and limitations prescribed by the Act of May 26, 1824, for the settlement of private land claims in the Louisiana Territory.

Section 8 extended to Florida said Act of May 26, 1824.

Section 12 enacted that any claims to land not brought within one year from passage of the Act and not prosecuted to final decision within two years "shall be forever barred, both at law and equity, and no other action at common law or proceeding in equity shall thereafter be sustained in any court whatever."

The Act of January 23, 1832, 4 S. 496, entitled "An Act to Direct the Manner of Issuing Patents on Confirmed Land Claims in the Territory of Florida, enacted as follows:

"That all patents that are, or may be, by law, directed to be issued on private land claims confirmed by the commissioners of private land claims, and by the several Acts of Congress approving their reports and confirming the titles to lands in the Territory of Florida, shall be, and they are hereby, required to be issued to the confirmees, or to the assignee, or present owner, where the land has been sold or transferred since the confirmation of the title; and it shall be the duty of the Commissioner of the General Land Office, upon the production of a regular chain of titles from the confirmee, to cause the patent to be issued to the heirs and legal representatives, or to the assignees of the confirmee, as the case may be."

The Court's attention is called to Section 2447 of the Revised Statutes that it may note that this section provides for the issuance of patents in case of any claim to land heretofore confirmed by law and in which *no provision is made by the confirmatory* statute for the issue of a patent. In the Marcos case the patent was issued under Section 8 of the Act of February 8, 1827, a fact which this Court wholly failed to notice. If the Act of Dec. 22, 1854, 10 S. 599, Section 2447 R. S. did apply, no patent could issue until the Commissioner of the General Land Office found the plat of survey approved by the Surveyor General to be correct.

In the Marcos case record proof was made that the survey of the lands patented as a private claim was not shown on the official plats in the Surveyor General's office. Record on case 135, October Term 1914, page 848.

ACTS OF CONGRESS IN THE WORDS OF ACT OF 1827 CONSTRUED

It will be observed that the Florida statute follows the form of the laws adopted for the settlement of private land claims in what is now Alabama, Louisiana and Missouri. All of these statutes are *in pari materia* and constitute one general plan adopted by Congress for the settlement of private land claims. It is manifest from the similarity of the several statutes above recited, that the adjudicated construction of any of those Acts is controlling with respect to the Florida statutes.

The Supreme Court of Alabama construed the Act of March 3, 1819, 3 Stats. 528, in McArthur v. Brue, 67th So. Rep. 249. It there says "The pivotal and decisive question here involved is whether the legal title to the land in question passed from the United States by an act of Congress, approved March 3, 1819, 3 Stats. 528 Ch. 100, or by patent of October 7, 1912. * * * It appears to us that the opinion and decision of this Court in the case of Nelson v. Weekly, 177 Ala. 130 and Michigan Land Company v. Rust, 168 U. S. 589, are decisive of this question, to the effect that the legal title to the land in question did not pass by the Act of Congress but only by the patent. * * * If the Act of Congress and the surveys merely authorized the grant to be made by patent, then of course the title passed only when the patent issued. This last condition we find from this record to be the true situation. It appears that there was not even an attempt to grant any land by the Act of Congress in question, but only to provide for a survey, location or identification of certain claims and when so located and identified for a grant for the issuance of a patent," etc.

The Act of March 3, 1819, was again construed by the Supreme Court of Alabama in Stein v. England, December, 1918, 202 Ala. 297, 80 So. Rep. text 363.

"Appellants seek to reverse the judgment of the lower Court whereby Appellee is entitled to lands * * * through inheritance from her ancestor,. Anthony Espejo. * * * Espejo's heirs presented their claims to this land to the * * * Commissioners * * * who reported the facts to Congress, *which, on March 22, 1819, confirmed the same* to the extent of 640 acres, which were duly surveyed and noted as belonging to the heirs of said Espejo on the maps of the United States Land Office filed * * * as early as 1831. The cultivation and use of the land were abandoned by Espejo's heirs and in 1870 the lands were regularly assessed for state and county taxes to unknown owners and were sold for taxes. This tax title, accompanied by actual, continuous, open, notorious and exclusive possession of the land under claim of ownership, adversely and hostile to the world passed by conveyance and inheritance to the Appellants in 1912. Since 1870 the lands have been assessed for taxes and the taxes paid by the Appellants and their predecessors in title. In January, 1913, some of the heirs of Espejo procured from the register and receiver of the United States Land Office * * * a private land claim certificate reciting that Espejo's claim to this land was confirmed by the Act of Congress of March 3, 1819, was surveyed as shown by the township plat approved in 1845, and that upon presentation of the certificate to the Commissioner of the General Land Office at Washington the heirs shall be entitltd to receive a patent. They then procured the issuance of the United States patent, dated April 30, 1913, reciting the certificate that the claim was confirmed by Congress in 1819 and was shown on the plats approved 1845 and that in consideration of the premises the United States patented the premises to Espejo's heirs. This suit was brought May 2, 1917, resulting in a judgment for the plaintiff."

The Court says: "The result of this appeal turns upon the question as to whether or not the lands sued for were subject to taxation or title thereto to be acquired

by adverse possession prior to the issuance of the patent. * * * It is admitted that defendants claim no interest under said patent, but in hostility thereto. Sec. 12 of the Act provides for the issuance of a certificate to the claimant by the register and receiver when in his opinion he (claimant) is entitled thereto, under such instructions as may be received from the Commissioner of the General Land Office; "which being presented, if that officer shall find" said certificate has been fairly obtained, according to the true intent and meaning of this act, then in that case a patent shall be granted as to other lands of the United States." The Court then cites from the case of Mims heirs v. Higgins, 39 Ala. 9. "It is impossible to resist the conclusion that by that provision the Commissioner of the General Land Office is clothed with the authority upon the presentation of the patent certificate to inquire whether it was fairly obtained according to the true intent and meaning of the Act, and if he decides that question in the negative to withhold a patent. Such an authority in the commissioner necessarily includes the power to review the act of the subordinate officers upon which the claim to a patent is predicated, for it would be absurd to say that the claimant had a perfect title by virtue of acts of subordinate officers, when because those acts were wrong, the commissioner has rightfully refused a patent; beside it would be utterly useless to give to the commissioner the power to refuse a patent where the certificate was wrongfully granted, if notwithstanding his refusal the claimant had a complete title." That "the act of the Commissioner of the General Land Office in determining whether or not the certificate had been fairly obtained according to the true intent and meaning of the act and therefore as to whether or not a patent should issue was a *judicial act* in that the commissioner was called upon to render a decision." * * * "The complete equitable title in this case did not pass from the United States until the patentees were entitled to demand

the patent as a matter of right. The certificate of the register and receiver was not obtained until January 31, 1913, and patent issued March 30, 1913. Up to this time the title was in the United States Government and the property was neither subject to taxation by the state, nor could title be acquired by adverse possession thereof." Citing Price v. Dennis, 159 Ala. 625 and Nelson v. Weekley, 177 Ala. 130 and 195 Ala. 1.

The Court further says the cases of Langdeau v. Hanes, 21 Wall 521 and Joplin v. Chachere, 192 U. S. 94 were distinguished in 177 Ala. 130.

The Act of April 12, 1814, was construed in Lafayette v. Blane, 3 La. Ann. 59, text 60-61. Held, "that act only confirmed title to lands claimed by virtue of incomplete French or Spanish grants, concessions, warrants or orders of survey, granted prior to Dec. 20, 1803, and having a special and definite location." * * * "We take the rule to be in order that the confirmation may have the force and effect of a patent, the description in the inchoate title, or the act of Congress must be such as will identify the land." The petition for confirmation filed with the Board recited that the Marcos claim had never been surveyed and was for 5,500 acres, about 2 miles north of Long Lake. 4 Am. St. Papers, pp. 471. 283 Duff Green Ed. pages 2-3 record in case 135 Oct. Term 1914.

By confirmation the United States recognizes the title derived from the former government, but such recognition extends only to the boundaries the grants themselves furnish.

McDonald v. Millaudon, 3 How. 693, text 706.
Slidell v. Grandjean, 111 U. S., 412, 28 L. ed. 330.

Confirmation is the assent to an estate already created * * does not create an estate.

Boquillas Cattle Co. v. Curtis, 213 U. S. 339-344.

From Public Land Laws, 1838, Vol. 2, page 863, Letter from the Commissioner to the Surveyor General of Florida, dated February 26, 1827:

"I have now the satisfaction to transmit a paper containing a copy of the act to provide for the confirmation and settlement of private land claims in East Florida, and for other purposes."

"You will perceive that the 7th and subsequent sections of this bill *provide for the surveying and connecting with the townships lines the private confirmed claims,* and for designating on the township plats the unconfirmed claims over 3,500 acres, which have been filed with the commissioners."

"The 7th section of this act has invested you with extensive powers, and very responsible duties, both executive *and judicial.*"

In July, 1922, the Marcos case was argued before Judge Bryan. It was then pointed out that the opinion of this Court reported in 236 U. S., 635, was as above set out directly contrary to its former decisions and the words of the Acts of Congress, which had been construed by the highest Courts of Alabama and Louisiana.

The learned Judge at the argument stated that he was bound by the decision of this Court in that case, and on the 26th of July, 1922, made a decree dismissing the bill as barred by laches.

If his conclusion was sound, he was bound only in his consideration of that case. If manifestly on the face of this Court's opinion it appeared the Court had fallen into error, the learned Judge was not bound to follow this Court's reasoning in the case at bar. Yet in determining the primary question of law involved, the Court of Appeals applied the reasoning in the Marcos case to the facts in the case at bar, and declared "The failure to assert

whatever interest appellants had continued for 50 years prior to the issuance of the patent, and in considering the question of laches the period of time involved extends over 73 years, or from 1847, the date of the survey, to 1920, when the bill was filed."

The finding of the Circuit Court of Appeals that the legal title to the grant to Fornells "vested in Mary Ann Davis in 1847 when the official survey was made" and that "The failure to assert whatever interests appellants had continued for 50 years prior to the issuance of the patent and in considering the question of laches the period of time involved extends over 73 years, or from 1847, the date of the survey, to 1920, when the bill was filed." Record p. 45, is so clearly error that a reversal should be had without further argument.

WHAT TITLE DID THE LEGAL REPRESENTATIVES OF MARY ANN DAVIS TAKE UNDER THE PATENT FROM THE UNITED STATES?

The Act of 20 May, 1836, prescribes that "in all cases where patents for public lands have been or may be issued in pursuance of any law of the United States to a person who has died, before the date of the patent, the title of the land designated therein shall enure to and become vested in the heirs, devisees or assigns of such deceased patentee as if the patent had issued to the deceased person during life."

Galloway v. Finley, 12 Pet. 264, text 296.

Held by Field, J., that the act embraced a patent to a confirmed Spanish grant.

Waterman v. Smith, 13 Cal. 373, text 420.

The Board and the husband of Mary Ann Davis must have known that the Archives furnished full information

that the mother of Rafael Andreu left a last will containing recitation of her several marriages and names of her children, yet the claim presented by Mary Ann Davis was established by three affidavits presented to the Board with her petition in which she set out that "Fornells widow died in 1820; that the tract of land was always claimed by Rafael Andrews her son and legal heir as his property ever since." And the Board reported "Fornells having died said land descended to Andrews, who sold to claimant."

See 4th Amer. State Papers, p. 218 (Duff Green Ed.).

Appellee is not chargeable with the fraud committed by Mary Ann Davis and her husband, who was connected officially with the Board. If the suit could have been instituted before Waters Smith Davis had parted with his interest the proceedings before the Board would have been material upon the question of the equities.

The patent from the United States to Mary Ann Davis is in effect a release to her and to her heirs of the legal title to the tract of land surveyed as the private claim of Pedro Fornells. When the claim was confirmed the equitable estate was vested in the legal representatives of Pedro Fornells.

The proceedings before the Board of Land Commissioners are printed in full in Volume 4, American State Papers (Duff Green Edition), pages 161-218-275. By mistake the copy of these proceedings attached to the bill as Exhibit A was omitted from the printed transcript This Court is asked to read the same in the American State papers.

Appellants make no attack upon the deed by Raphael Andreu to Mary Ann Davis set out in the proceedings for confirmation of the grant as a conveyance of whatevr interest Andreu had in the grant. They do not seek

to go back of the deed to Sanchez from Antonia Porsila for an undivided one-half interest in the grant to Pedro Fornells.

That Mary Ann Davis took under the patent issued in 1898 the legal title as trustee can not be successfully denied.

It is established by the following statutes and decisions of this and other courts and rulings of the Land Department.

Acts of Congress of May 8, 1822 and February 8, 1827.

United States v. Perchman, 7 Pet. 51, text 98.

United States v. John Huertas, 8 Pet. 488.

Castro v. Hendricks, 23 How., text 422.

Martin v. United States, Hoffmans Reports 146, text 148.

United States v. Patterson, 15 How., text 12 and 13.

3 Am. State Papers (G. & S. Ed.) 450.

5 Am. State Papers (G. & S. Ed.) 376.

The equitable rights which originated before the date of the patent may be examined and enforced in equity.

Brush v. Ware, 15 Pet. 93, text 107.

Salmon v. Symonds, 30 Cal. 301, text 306-307.

"It matters not whether the presentation (for confirmation) was made by the confirmee in his own name in good faith, or with intent to defraud the actual owner of the claim. A court of equity will control the legal title in his hands so as to protect the just rights of others."

Estrada v. Murphy, 19 Cal. 248, text 272-274.

O'Connell v. Dougherty, 32 Cal. 458, text 462.

Wilson v. Castro, 31 Cal. 420, text 434-440.

Clark v. Lockwood, 21 Cal. 220-222.
Emerich v. Penniman, 26 Cal. 124.

Under the law the patent delivered in 1898 vested in the legal patentee the legal title in trust for the true owners under Pedro Fornells. As Judge Call correctly decided that as between the United States and the true owners under the Spanish Concession "it is from the issuance of the patent that the title became perfect in this case."

288 Fed., text 415.

The case then narrows down to this proposition: did the Court of Appeals err in sustaining the decree of the District Judge which dismissed the bill without requiring the defendant to answer?

The Circuit Court of Appeals held that the case stated in the bill did not entitle appellants to a decree; that upon the case stated it was too late to enter into the merits of appellants' "claim of title."

The Court however, made out "the case stated by the bill" upon the theory that Fornells held a perfect title at the cession of the Floridas; that the fee never passed to the United States; that the confirmation operated as a release of the interest of the United States without the issuance of a patent; that in considering the question of laches, the period of time involved extends over 73 years. Record p. 45.

The first assignment of error is *"The Court failed to understand the nature of the case made by the bill."*

We realize the seriousness of the charge made. It is based on the statement in the opinion: "The bill does not aver that Mary Ann Davis ever acknowledged or recognized that she held the title to a half interest in trust." Record page 45.

The Court then says that although the husband of Mary Ann Davis did not dispute "the claim" of Venancio Sanchez such admission if proved would not bind the estate of his wife after her decease.

There are four answers to this assertion:

First: The trust under which Waters Smith Davis held the legal title to the grant arose by operation of law when the patent was delivered in 1898. Mary Ann Davis died about 1885, long before the proceedings for the issuance of a patent were initiated by counsel for Venancio Sanchez.

Upon the statements of the bill as to title before the patent issued, from 1824 to 1843 Mary Ann Davis and Antonia Porsila held as tenants in common all the equitable estate granted by Spain to Pedro Fornells. After A. D. 1843 Venancio Sanchez was the owner of the undivided half interest conveyed to him by Antonia Porsila. From that date Mary Ann Davis (admitting as the bill does that she acquired an estate or interest by and under her deed from Raphael Andreu) and Venancio Sanchez as tenants in common held the equitable estate in the 175 acres of uplands confirmed to Mary Ann Davis, and the United States held the legal title.

Second: Under the laws of Florida the separate estate of a married woman is in the care and management of her husband.

Section 2589 General Statutes, Section 3948 Rev. Genl. Stats.

Third: After the patent issued in 1898 not only by the terms of the confirmatory act, but upon general equity principles Waters Smith Davis holding under his mother, Mary Ann Davis, held the legal title as trustee for the legal representatives of Pedro Fornells, the grantee from Spain. His mother's estate was bound by law, not by admissions.

It matters not whether Mary Ann Davis in her life time recognized the estate and interest held by her co-tenant under the grant from Spain. It was at most a mere equitable title. The admission of her husband, in whose care and management her estate was, establishes that she failed to assert and bring home to such tenant an intention to hold a full and complete equitable title, and failed to take and hold an exclusive occupancy of the grant under the confirmation by the United States—that she never did assert a title to the entire equitable estate, and never did put her co-tenant on notice. Had she claimed the entire equitable estate under her deed from Andreu of "all his right, title and interest" in the grant such claim imposed no duty on Sanchez. His estate was what his deed made it and the United States held in trust the legal title subject to his equitable title, whatever it might be, and subject to the equitable estate in Mary Ann Davis under her deed from Andreu, whatever that might be.

The admissions of either party were ineffective to create rights or interests though admissible in estoppel.

The bill alleges the lands are wild and unoccupied lands; that they remain as they were in 1827, "wild, unoccupied land, not in the actual occupancy of any person claiming title thereto."

Had Mary Ann Davis or her agent Water Smith Davis denied the estate held by Venancio Sanchez from 1843 to 1892 certainly counsel for Venancio Sanchez would not have advised her son at the latter date of his intention to procure the issuance of a patent, and inquired of him if his mother had deeded the interest she acquired from Raphael Andreu.

In 1892 counsel for Sanchez had a very imperfect knowledge of the law of Spanish grants. It is probable he contemplated the issuance of a patent to the then owners jointly under the provisions of the Act of 23d of January, 1832, which authorized the issuance of the patent

to the joint owners of confirmed private land claims in Florida, which law is yet unrepealed.

See re Lucy B. Abbott, 5 Land Decisions, page 677.

Fourth: In the affidavit made part of the bill and in paragraph 19 it is alleged that Waters Smith Davis, the grantor of defendant, at a date after he acquired the interests of his co-heirs (1893) and before the issuance of the patent, came to St. Augustine and proposed to sell his undivided interest to Venancio Sanchez or buy Sanchez' interest. Record page 25.

The motion to dismiss admitted this allegation of fact.

In its consideration of this allegation of the bill the Court again exhibits its failure to understand the case made by the bill.

Its opinion on page 45 of the record says "The averment that Waters S. Davis offered to sell to Venancio Sanchez or to buy from him * * * is not sufficient to support the inference that he acknowledged or recognized that he held any part of the title as trustee."

When this admission was made he did not stand in a trust relation to Sanchez. The United States was yet trustee for all the equitable owners.

The bill alleges that *shortly prior to the issuance of the patent* said Waters Smith Davis in the store of Venancio Sanchez did admit and recognize the rights of Sanchez in the 175 acres on Key Biscayne, as his cotenant. Record p. 25, record p. 9.

This interview between Davis and Sanchez took place prior to the issuance of the patent and "thereafter failing to sell his undivided interest to Sanchez, * * * said Waters Smith Davis, on to-wit, August 10, 1893, applied for a patent," etc. Record p. 10.

The admission of Davis made to Sanchez after he had been invited by Sanchez' counsel to join in applying for

a patent, and before he applied for the issue of the patent he obtained five years after, estops him and appellee claiming under him from denying appellants' estate under the patent.

The statement in the opinion that Venancio Sanchez purchased "his adverse claim which if valid he should have established while the witnesses who knew about it were living," is entitled to slight consideration in the face of this admitted fact. Such admitted fact rebuts the further statement in the opinion that "the long delay and death of material witnesses appear on the face of the bill and if they constitute laches the bill may be dismissed without requiring an answer." Record page 46.

THE CASE DECIDED IS NOT THE CASE MADE BY THE BILL.

The Court treats the case as if the confirmation of the grant to Fornells upon the petition of Mary Ann Davis established a trust, and imposed a present duty upon Fornells' legal representatives other than Marcus Andreu to take action to assert against the confirmee their equitable rights; that their long delay to proceed has resulted in the loss of evidence by the death of witnesses; that "the hour glass must supply the ravages of the scythe."

There is nothing in the bill to sustain such a disposition of the case. There are no deceased witnesses whose testimony would be material in support of the title of appellee or that of his grantor. The bill alleges that in a certain state of the law Rafael Andreu who deeded his interest to Mary Ann Davis, and his half sister, Antonia Porsila, who deeded an undivided half interest in the grant, were tenants in common from the death of their mother. The lands were unsurveyed until 1847. At that date Mary Ann Davis and Venancio Sanchez were tenants in common, and about that time Mary Ann Davis' husband was negotiating with Sanchez to settle the Key.

The bill seeks a decree declaring the legal title in appellants for a one-half interest in the 175 acres described in the patent, and a half interest in the submerged lands granted by the State in 1856 to the then equitable owners of the uplands. The title to the submerged land is from the State of Florida and began in A. D. 1856. It is wholly independent of the title confirmed to Mary Ann Davis.

Complainants are greatly prejudiced by the death of Venancio Sanchez, whose testimony would sustain the allegations of the bill, especially the statement that after he acquired the interests of his co-heirs and before the issuance of the patent Waters Smith Davis came to St. Augustine from Texas and offered Mr. Sanchez to buy or sell.

It does not appear on the face of the bill, nor is it a fact that appellee is prejudiced by the death of any witness. Davis' father might, if living, deny that he and Sanchez planned to settle the Key, but we cannot assume he would deny it. Mr. Davis is living and doubtless will be a witness in the case.

Complainant's case is practically the case made in Wilson vs. Castro, 31 Cal. 420. We specially call this Court's attention to that case. In that case as in the case at bar, the decree of the lower court was made upon demurrer to the bill. The confirmation of the Mexican grant was upon petition of a third party as in the case at bar. The Court there says, text page 432: "The real issues tendered by the complainants are—Did Antonio Belona have a property interest in the rancho which upon his death descended to his brother and sister, and which was afterwards acquired by the plaintiffs? And do the defendants hold the legal title thereto in trust for the plaintiffs?"

The Court held the proceedings for confirmation were not of necessity adverse to the rights and interests of the heirs of the grantee under Mexico, and even if

they were intended to be so, could not operate to create an equitable estoppel upon such heirs at law.

The case meets and answers the contentions made in the two lower courts by counsel for appellee and sustains the first and second assignments of error on this appeal.

The third, fourth and fifth assignments of error will be found to be sustained by the statutes found in the argument made upon the case of Wilson Cypress Company vs. Marcos.

THE COURT ERRED IN HOLDING THAT UPON THE MATERIAL ALLEGATIONS OF FACT MADE BY THE BILL IN DEFINITE TERMS, ADMITTED BY THE MOTION TO DISMISS, THE DEFENSE OF BONA FIDE PURCHASER, AND LACHES OF COMPLAINANTS COULD BE MADE BY MOTION TO DISMISS.

Does appellee occupy the position of a bona fide purchaser for value *without notice?* May he make this defense by motion to dismiss?

Mr. Justice Field speaking for the Court in Teall v. Schroeder, 158 U. S. text 178, says "As the Complainants and all other parties interested could have obtained the necessary knowledge upon those subjects by proper inquiries they are charged with such knowledge from the time those conveyances were placed on record, and held to all the consequences following this acquisition."

Oliver v. Piatt, 3 How., text 410.

The rule laid down in 2 Pomeroy Eq. Jur. Sec. 745 is "The essential elements which constitute a bona fide purchaser are therefore three—a valuable consideration, the absence of notice, and presence of good faith."

While two of these essential elements may be found in this case the absence of notice is lacking.

In the case at bar the legal title was direct from the United States to Davis by the patent and all the proceedings in the General Land Office gave appellee notice of Sanchez half interest, and Sanchez deeds of record afforded notice of a late date. The deed from Venancio Sanchez to his brother's children, appellants other than William J. Sanchez, was recorded in Dade County, 17 June, 1895, three years before the patent was delivered. Record page 37.

DEFENSE MUST BE SET UP BY PLEA OR ANSWER

But if in law appellee does "occupy the position of a bona fide purchaser" he must make his defense by plea or answer.

"Whether this is such a case as will give Chiles the protection he claims (as a bona fide purchaser) depends on the rules which courts of equity have adopted as to bona fide purchasers for a valuable consideration without notice."

Boone v. Chiles, 10 Peters 177, text 210.

He must plead himself a purchaser without notice

Bodmen v. Vandenbendy, 1 Vern 179. Also the cases cited in 10 Peters, text 212.

It is only when the fact is clearly shown by the bill that resort to a demurrer may be used to avail of the defense of bona fide purchaser.

2 Pomeroy Eq. Jur. Sec. 784.

A defendant cannot set up the defense of being a bona fide purchaser for value orally at the hearing; such defense should be pleaded formally or set up by way of answer.

Story Eq. Jur. Sec. 805a.

The learned District Judge was in error in holding the bill should be dismissed without the defense being made by answer. The Circuit Court of Appeals was asked to determine and announce the practice to be followed where "the bill sets forth what were the impediments to an earlier prosecution of the claim." Badger v. Badger, 2 Wall, text 95.

This the Court failed to do. The controlling impediment to an earlier prosecution of the suit received in its opinion this slight notice, "Appellants * * * set out as excuses * * * their inability to trace the relationship between Antonia Porsila and Rafael Andreu until discovery in 1919 of an Index to the Spanish Archives * * * the Index would only have furnished information already possessed by Venancio Sanchez at the time he purchased 'the claim' now sought to be enforced."

The opinion does not fairly state the facts set out in the bill. Venancio Sanchez did not purchase an adverse claim. He acquired by deed the undivided one-half interest in the grant of 175 acres to Fornells, the legal title to which remained in the United States until 1898.

The Index furnished information of the existence of church records which will now enable these complainants to establish by ancient documentary evidence the marriage of Fornells and the mother of Andreu, the birth of Antonia Porsila, and the death intestate of Fornells, the fact that Fornells' widow was at her death Mariana Tudorina, who died testate and whose will is in the Spanish archives.

The Court's statement that the Index to the Spanish Archives "would only have furnished information already possessed by Venancio Sanchez at the time he purchased 'the claim' now sought to be enforced" has been proved to be unwarranted by the contents of that Index since it was discovered. Sanchez or his attorney could not have been possessed of the imagination to have conceived that the widow of Andreu, afterwards widow of

Fornells, had the name Mariana Tudorina, and so have found and examined her will in the Spanish form and language, and thus show in a court of equity that they hold a beneficial interest under the United States patent.

The information possessed by Mr. Sanchez in 1843 when he took and recorded his deed to an undivided half interest in the grant was that his grantor was a sister (half sister) of Rafael Andreu, who had deeded his interest to Mary Ann Davis. Neither Venancio Sanchez nor Mary Ann Davis and her husband, William G. Davis, who had been associated with the Board of Land Commissioners that confirmed the grant to Fornells, deemed a patent from the United States necessary. Both the equitable owners treated the lands as their joint property and took proceedings to make it the principal town which Key West came to be. Mr. Sanchez's deed was spread on the public records, and his ownership recognized by the husband of Mary Ann Davis, in whose care and management was her property. It was not until Mr. Sanchez brought the matter of his ownership to the attention of appellants' counsel in 1892 that either party took action to procure a patent from the United States. For nearly fifty years both parties had been content with their equitable titles. Counsel for Venancio Sanchez initiated the proceedings, and invited the heirs of Mary Ann Davis to join with Mr. Sanchez in obtaining a patent for the 175 acres of upland they held in common. Only then was Waters Smith Davis aroused to action. He first acquired the interests of his co-heirs, visited St. Augustine in expectation of acquiring Mr. Sanchez's half interest, and then applied for issuance of a patent by the United States.

Until the patent issued Mr. Sanchez had no grounds to bring suit. The equitable title rested in the legal representativs of Pedro Fornells, he holding a half interest and as he supposed and admitted Mary Ann Davis while living holding the other half interest. The United States

held the legal title from the cession until delivery of the patent in 1898.

After the legal title was vested in Waters Smith Davis under his deed from his co-heirs of Mary Ann Davis, the right to sue for a transfer of Sanchez's estate in such legal title first accrued. He then was not required to bring an action. He could rest on his equitable estate in the patented lands and his legal estate in the submerged lands so long as no claim of exclusive right was brought home to him by his co-tenant. The patentee held the estate which the law imposed upon him, though held invito domino.

Where plaintiff has a legal right to delay failure to sue is not fatal.

Demuth v. Old Town Bank, 85 Md. 315, 60 Am. St. Rep. 328.

The admitted allegation of the bill is that from 1824 to the date the bill was filed the lands have remained as left by nature, not in the occupancy of any person claiming title thereto.

Laches will not be imputed to one in peaceable possession of land under an equitable title for delay in resorting to a court of equity for protection against the legal title.

Hays v. Carroll, 74 Minn. 134, text 139; 2 Pomeroy Eq. Jur. Sec. 817.

Where a continuing right to invoke the aid of a court of equity exists, it may be asserted at any time.

Dosar v. Hammell, 89 Okl. 152, 214 p. 718.

Miner v. Beekman, 50 N. Y., text 343.

Cooper v. Rhea, 82 Kan. 109, 29 L. R. A. (N. S.) 930, 136 A. S. R. 100, 20 Am. Cas. 42.

ON THESE ADMITTED FACTS SET FORTH IN THE BILL, AND FAIRLY DEDUCED FROM THE FACTS SET FORTH AS AN EXCUSE FOR NOT EARLIER BRINGING SUIT, DO THE RULES PRESCRIBED FOR THE COURTS OF EQUITY AUTHORIZE A DISMISSAL OF COMPLAINANTS' BILL ON MOTION?

Such is not the practice.

It is only when the case of plaintiff as stated in his bill will not entitle him to a decree that the judgment of the Court whether the defendant shall answer may be required by demurrer.

Hovenden v. Lord Annesley, 2 Sch. & Lef. 607.
Badger v. Badger, 2 Wall 87, text 95.
Lonsdale v. Smith, 106 U. S. 391, text 393.

Where the Court is not sure the plaintiff is guilty of laches, an inquiry will be ordered.

Pickering v. Stamford, 2 Ves. Jr. 272.
Chalmer v. Bradley, 1 Jac. and Walk. 63.

PRACTICE UNDER RULE 29

The error committed by the learned District Judge was in sustaining appellee's motion to dismiss the bill on the ground of laches, which error should have been corrected by the Court of Appeals.

The argument may be divided into two branches:

(a) The practice under Rule 29.

(b) Whether under the facts of this case as set out in the bill the motion to dismiss should have been granted.

Rule 29 was taken from the English Orders and Rules of Court adopted in 1883. It is Order 25 and reads —"No demurrer shall be allowed."

As construed by the court in England, proceedings under this order take the place of demurrers in the sense that the court is enabled when it sees no reasonable ground of action or defense, to put an end to the action or defense. It is not bound to regard the case with the same strictness as under the old practice on demurrer, the court having now more regard to the reasonableness or unreasonableness of the claim or defense.

Dadswell v. Jacobs, 34 Ch. D. 278.
Burstall v. Beyfus, 26 Ch. D. 35.

"Every defense in point of law arising on the face of the bill * * * shall be made by motion or in the answer."

But the rule prescribes "Every defense heretofore presentable by plea in bar or abatement shall be made in the answer."

Rule 29, and cases cited in Dewhurst's Rules, 2 edition, pages 495-500.

Objection arising out of length of time can be taken by demurrer only when the bill so states the plaintiff's case that there is nothing to interfere with the lapse of time.

Hodle v. Healey, 1 Ves. & Bea., 539.

Appellee's motion to dismiss operated to admit the allegations of the bill.

Baltimore & Ohio R. Co. v. United States—U. S.—decided March 3d, 1924.

Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. 220-222 and cases cited.

First National Bank v. Durr, 246 Fed. 163.

Forbes v. Wilson, 243 Fed. 264.

Lowenthal v. Georgia C. & P. R. Co., 233 Fed 1010-1014.

Williams v. Mason, 289 Fed. 812-814.

Motion to dismiss must be denied unless the motion clearly discloses that on the allegations of the bill taken as true it must be dismissed on final hearing for want of equity.

Commodore's Point Terminal Co. v. Hudnal, 283 Fed. 150-163.

Where it appears on the facts and circumstances disclosed in the bill that justice can be better secured by leaving the merits of the case to be disposed of after the coming in of the answer the bill will not be dismissed on motion.

O'Keefee v. New Orleans, 273 Fed. 560-561.

Loughran v. Quaker City, etc. Co., 281 Fed. 186-188.

Such a practice protects against a hasty adjudication on a summary proceeding.

Ralston Steel Co. v. Nat'l Dump Car Co., 222 Fed. 590.

Wright v. Barnard, 233 Fed. 329-330.

This suit was brought within seven years from the time appellee took his deed from Davis, trustee under the patent from the United States by operation of law.

Where length of time will not bar the right to bring ejectment then it shall not bar the right to bring a bill in equity.

Cook v. Arnham, 3 P. Wms. 287.

THE COURT ERRED IN FINDING THAT THE BILL ON ITS FACE SHOWED SUCH LONG DELAY AS TO CONSTITUTE LACHES. SEVENTH ASSIGNMENT OF ERROR.

Does the bill on its face state a case which does not entitle appellants to a decree?

Where the right to relief is clear and definite but has not been asserted because after diligent effort the party could not obtain sufficient information of existing documentary evidence to maintain an action, it is not a stale demand if asserted within a reasonable time after the necessary information is obtained.

Appellants met the anticipated defense of staleness of their demand by allegations in the bill showing their inability to apply to a court for relief with any expectation of success between the date when the patent issued and the date the bill was filed. This required the defense of laches to be made by plea or answer.

Ganton v. Carroll, 101 U. S. 426, text 429.
Hays v. Seattle, 251 U. S. 233, text 239.

See statement of Lord Eldon in Foster v. Hodgson, 19 Ves., text 184.

In view of the voluntary action of Waters Smith Davis in applying for and obtaining the patent to issue in the name of Mary Ann Davis when by the Act of 23 of January, 1832, it might issue in the names of the real owners Venancio Sanchez and himself, did he not take and hold the legal title as an express trust? If he did, then no length of time is a bar to its enforcement.

New Orleans vs. Warner, 175 U. S. 120, text 130.

The question to be determined on this appeal is whether or not the failure to bring suit before Davis

parted with his legal title excused by the facts set out in the bill and admitted by the motion to dismiss clearly establishes that upon final hearing the bill should be dismissed.

The bill alleges that the common title is under the grant to Pedro Fornells that the patentee's claim of title is under a deed of Rafael Andreu of "all our right, title and interest" in the tract granted by Governor White, with warranty against themselves; that in 1843 Antonio Porsilla (widow of Barrosa) conveyed to Venancio Sanchez the undivided one-half of the grant, which deed was promptly recorded in the county where the land lay, as also in St. Johns County, where was recorded the deed from Andreu to Davis,—record Page 7; that Sanchez was advised that his grantor was the sister of Rafael Andreu; that prior to issuance of the patent he made diligent efforts to find Antonia Barrosa, or any of her descendants while his right to an undivided half of the grant was undisputed—to get legal evidence to prove her relationship to Rafael Andreu; that his efforts were extended, exhaustive and persistent; that he inquired at the College of Notaries at Havana and from the descendants of Andreu; that he diligently and persistently sought in the church records in Havana and St Augustine for proof to establish Antonia Barrosa to be the sister of Rafael Andreu; that he had no clue and after long and persistent efforts could get no clue to lead him to the record proof to establish that his grantor and Davis' grantor were brother and sister; that this inability to get record proof to connect his grantor and Davis' grantor with a common ancestor or common right continued until July, 1919, when there fell into the hands of his counsel Alvarez Index to the Spanish Archives, supposed not to be extant; that these archives searched, revealed that there had existed before the change of flags, written instruments in the Spanish language of testamentary proceedings on the Estate of one Mariana Tudorina, which showed her to

be the widow of Pedro Fornells, the mother of Antonia Porsila de Barrosa under whom Mr. Sanchez holds a half interest in the patented lands and to be the mother of Rafael Andreu, who quit-claimed his interest in the patented land to Davis' mother; that promptly on getting this clue informing counsel of Sanchez where to look for proof of the relationship of the respective grantors of Sanchez and Davis, search was made, and it was then first found that written documents existed which establish the extent and interest of Sanchez and Davis under a common title to the 175 acres described in the patent issued to Mary Ann Davis; that from before the date of the patent until his death in 1899 Sanchez never desisted from his efforts to make proof to establish the relationship between his grantor and the grantor of Davis; that without intermission a persistent search for such proof was kept up; that it was only after the discovery revealed by Alvarez Index in July, 1919, and by such discovery that appellants were and are able to produce legal evidence that upon the death of the widow of Fornells the grant made to him descended to the mother of Andreu and her daughter, if by the civil law such was the course of descent upon the death of the husband and father intestate.

This Court, we are confident, will hold that having admitted the foregoing alleged facts to be true it is clear that on the face of their bill appellants are not barred of the relief prayed.

IF AN ACTION WAS CERTAIN TO FAIL FOR WANT OF EXISTING DOCUMENTARY EVIDENCE, IS IT A PRESUMPTION OF ACQUIESCENCE THAT NO ACTION WAS BEGUN WHILE SUCH CONDITION CONTINUED?

On the facts alleged was Venancio Sanchez before he died in 1899 bound to sue Waters Smith Davis, who

obtained the patent in 1898 after advised by counsel it was a certainty such suit would fail for lack of documentary evidence to establish the co-heirship of his grantor with Andreu under whom Davis had acquired the legal title by United States patent?

Were appellants still under the same disability required to bring a suit which must fail for a like reason?

It is a fact that after Alvarez Index to the Spanish Archives fell into the hands of counsel and after this suit was brought, the bundles of the archives relating to Fornell's estate could not be found. They were not in custody of the State of Florida and the Land and State Departments of the government could furnish no information of their disposition or whereabouts. See letter 1027650 "K" D. C. February 17, 1922—Florida Archives—from Commissioner Spry to Senator Fletcher.

Only since the record in this case has been filed here has counsel discovered that these portions of the Archives are in the Library of Congress.

The motion to dismiss admits that the testamentary proceedings in the estate of Mariana Tudorina, the widow of Pedro Fornells, mother of Antonia Porsila, under whom appellants claim are shown by Alvarez's Index to be in these archives, and further admits the fact alleged that only after counsel's discovery of the Index to the Spanish Archives and because of such discovery could appellants produce the documentary evidence ncessary to sustain a suit to maintain their title to the lands described in the patent delivered to Mr. Davis, covering the lands jointly owned by appllants and Waters Smith Davis from 1895 to 1913, and thereafter by appellants and appellee.

The fullest knowledge with entire but mere acquiescence can not bind a party who has no means of resistance.

The Court takes judicial notice these Archives are in the Spanish language. The records in the Florida cases for confirmation of private claims establish that they

consist of loose papers filed away in bundles. Without an index their contents are practically inaccessible. Counsel has lately learned that the present custodian realizing this, has begun to assemble the papers by subjects.

The plaintiff must have slept upon his rights and show no excuse for his laches in asserting them to be guilty of laches.

Speidel v. Henrici, 120 U. S. 377, text 387.

Lapse of time is permitted in equity to defeat an acknowledged right only on the ground of its affording evidence of presumption that such right has been abandoned; it never prevails when the presumption is outweighed by opposing facts and circumstances.

Lloyd v. Simons, 97 Minn. 315, text 317.

In a case where the chancellor said, "I do not see that the plaintiffs did not have the same means of gaining information before, that they had at the time of filing their bill," he yet held that lapse of time imputed to laches may be excused by the obscurity of the transaction where the plaintiff was disabled from obtaining full "information of his rights."

Muney v. Palmer, 2 Sch. and Lefs 474, text 487.

What is the difference in legal effect between inability to obtain information of one's rights, and inability to obtain documentary evidence necessary to maintain an action to enforce such right?

In the Court below, counsel for appellee contended that the law is that the excuses for laches presented by the bill cannot avail appellants because appellee is in no way chargeable or connected with the facts and circumstances which prevented Venancio Sanchez and appellants from applying to a court to determine their equitable rights under the patent.

We ask this Court to consider and decide this question of law. Our contention is that the principles upon which Courts of Equity act, require this Court to hold that equitable owners, shown not to have acquiesced in a claim of absolute ownership (if such claim be made) by a trustee holding the legal title to land—not shown to have been ousted from possession of lands held for their benefit by such trustee, who present facts showing that they have been precluded from maintaining with any expectation of success an action to establish by court decree their equitable title, who later discover the documentary evidence which indisputably establishes their equitable rights where there has been no material change in the property are not barred by laches, if they proceed promptly after such discovery to assert their equitable rights. We ask this Court to consider the reason of the rule under which Courts of Equity proceed. The growth of the law is by the application of established rules to new facts and circumstances.

On their statement of the facts have appellants left undone any act required? Does it appear they or Venancio Sanchez were bound to presume that Davis acquired the interests of his co-heirs under his mother and sought for and obtained a patent for the lands granted Fornells with the intention to claim title to the entire tract, under Rafael Andreu's deed of his interest in the grant?

As to Davis, appellee's grantor, do the facts set out show or authorize the Court to find that by the lapse of time there was any change of his situation? The law made him trustee for all the beneficiaries under the patent. Do the circumstances of this case as set out relieve him of his obligation to respect the rights of his cotenants?

Upon the facts alleged in the bill he did recognize those rights until 1913, when, unknown to appellants, he conveyed the whole grant to appellee.

Appellee stood in Davis' shoes, when with notice of the character of Davis' title he took his deed.

Until Davis conveyed the whole 175 acres to appellee, Davis and appellants were tenants in common of 175 acres of unoccupied wild land.

The opinion of the learned District Judge assumes Sanchez had been ousted from the grant by Davis.

Ouster is a question of fact which involves the intention and motives of the parties in possession.

Beal v. McNenemy, 63 Neb. 70, 93 Am. St. Rep. 427, citing cases.

If appellee's possession did operate as a disseisin of his co-tenants he has not had exclusive possession as a claimant in severalty long enough to ripen into title, or bar appellants' right to the property, even by the terms of the Florida Statute of Limitations prescribed for actions at law, which is seven years.

Section 1718 General Statutes; Section 2932 Revised Genl. Statutes.

Shannon v. Lamb, 126 N. C. 38, 35 S. E. 232.

Thorpe v. Holcomb, 126 N. C., 35 S. E. 608.

The Common Law is in force in Florida except as charged by statute, which is silent as to when trust estates are barred.

How does appellee's possession for less than the period required to bar an action to recover land bar this equitable action to decree appellee to hold the legal title acquired from Davis in trust?

Do the facts set out in the bill as an excuse for not asking for a partition of the grant or for a decree declaring Davis to hold the legal title vested by the patent as trustee for the true owners show neglectful repose by appellants, or by Venancio Sanchez?

Under the law the patentee held the legal title as trustee *in invitum*. Appellants were never required to

obtain a decree declaring the trust. It arose by operation of law and continued until Davis conveyed to appellee.

Davis' paper title was only for the interest of Rafael Andreu. The Commissioners confirmed only that title which Mary Ann Davis proved before them.

Appellants not being barred at law of the right to assert against appellee an interest in the patented lands, there can be no laches in proceeding in equity within the same time.

Kelly v. Boettcher, 85 Fed., text 62.

Boatsh v. Boysen, 175 Fed., text 708 and cases cited p. 707.

Wilson v. Plutus Mining Co., 174 Fed., text 320 and cases cited.

If Davis ever had any possession of the land such possession was limited by the extent of his paper title to the interest conveyed by Andreu, and was not in hostility to the equitable rights of Sanchez. The law will not presume an intention to defraud. In the absence of anything to the contrary Davis is presumed to have entered under a claim of Andreu's interest.

Turner v. Sawyer, 150 U. S. 578, text 586.

Reynolds v. Sumner, 126 Ill. 71, 9 Am. St. Rep. 528, 1 L. R. A. 330.

Jones v. Dyer, 109 Am. St. Reps. 603 and notes pages 611-618-623.

The bill alleges and the motion to dismiss admits there never has been any enclosure of the lands, and from the change of flags they have remained unoccupied, wild lands.

SANCHEZ' RIGHTS NEVER ABANDONED

The admitted allegations of the bill show there has been no neglect on the part of appellants or Venancio Sanchez.

In Pond Creek Coal Co. v. Hatfield, 239 Fed. 622, Judge Knappen has set out by citations from opinions of the Supreme Court the rule of law to be applied in the case at bar.

We adopt as part of this brief the several statements of the law as printed on pages 628 and 629 and ask this Court to be guided thereby in its decision in this case. The facts in the Pond Creek Coal Co. case are not materially different in principle from the case at bar.

In that case it is said, page 630, that plaintiff had no occasion to examine the public records for any claim on the part of defendant; that plaintiff had no knowledge of defendant's claim until shortly before the bill was filed.

In the case at bar appellants had no occasion to examine the public records to learn if Davis had made a transfer of his interest as tenant in common or of his legal title to the whole tract, and no knowledge that he had done so until shortly before the bill was filed.

Record only operates as notice to those who are compelled to search the records to protect their own interests. 2 Pomeroy Eq. Jur., Sec. 657. See cases cited under note 2, especially 1 Sand ch. 419.

The Florida statute for recording deeds, etc., is approximately like the Virginia statute. Of that statute it is said in McCormack v. James, 36 Fed., text 18-19:

"The very object of the legislature in enacting the statute was to give the purchaser or other person dealing with the property notice of any incumbrance thereon.

* * So complete are the requirements for the registration of all matters touching the titles to land, so easy of access is the knowledge where and how it can be attained, that in the language of a distinguished law writer 'for one to be deceived argues a general negligence so gross as to exclude sympathy for the sufferer.'" 2 Minor Inst. 988.

Under the recording statute it was necessary for appellee to search back to the primary title in Davis.

This disclosed the patent upon confirmation of the grant to Pedro Fornells—the confirmation proceedings were a link in the chain of title and disclosed that Mary Ann Davis got her title from Rafael Andreu, and the conveyance was of his right, title and interest only.

Appellee knew or was bound to know that the patent was a deed of trust, at most a mere quit claim from the United States, and the patentee was trustee for the equitable owners whoever they might be. He therefore was required to learn what the records of the General Land Office showed.

Great Northern Ry. Co. v. Steike, 261 U. S., text 131-132.

A purchaser can not plead no notice if he abstained from calling for information to which he is entitled by law.

Parker v. White, 2 N. R. 157, 1 Hem. & M. 167.

Sanchez was not required to take notice of the deed of the three acres by the United States to Davis. The recording statute applies only to successive purchasers from the same seller.

Gillig v. Maass, 28 N. Y. 191.
Purdy v. Huntington, 42 N. Y. 334-347.

Venancio Sanchez and appellants were not required to search the public records or keep track of their trustee to see that he did not convey the legal title vested in him by the patent.

The change of circumstances which appellee may set up by answer as a defense to this suit is that appellants' failure to bring an action against Davis, to have him convey to them the one-half of the land described in the patent to the confirmee of the grant to Fornells has allowed him to pay Davis for 175 acres instead of half that area, and to pay taxes on the whole tract since 1913.

When that defense is properly presented appellants must meet it.

It will then be found that appellants' rights were continuing, inherent in them under the law governing patents issued for confirmed Spanish grants, and might be asserted at any time.

Reorganized Church, etc., v. Church of Christ, 60 Fed. 937, text 956.

Orthwein v. Thomas, 11 Am. St. Rep. 159, text 169.

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, text 450.

Southern Pac. R. Co. v. Stanley, 49 Fed. 263, text 266.

Miner v. Beekman, 50 N. Y. 337, text 343.

Sharon v. Tucker, 144 U. S. 533.

In the last cited case the suit was brought in 1890 upon a title acquired in 1840. The Court gave a decree that complainant's title resting on the recollection of witnesses be declared to be complete and the defendant be enjoined from asserting title.

Unless it appears on the face of the bill that such a defense must prevail after evidence taken the bill may not be dismissed on motion.

One of the facts which defendant would be required to prove is loss of material evidence because of appel-

lants' delay to sue Davis. In this case the lapse of time has made it difficult for appellants to make out their case. It has in no way affected the defense, since all facts to be proved by appellee happened after the patent was applied for. Until that date both Davis senior and Sanchez had rested upon their respective deeds of conveyance, and the Statute under which the grant to Fornells had been confirmed. Neither the recorded deeds nor the Statute are affected by lapse of time.

As to the taxes paid since 1913 and as to the purchase money paid Davis by appellee the District Court has full power to make a decree which will do equity, hence on the face of the bill it does not appear appellants' bill must be dismissed on final hearing.

THE TRUST NEVER DENIED

The bill alleges that Waters Smith Davis, appellee's grantor, never expressly denied the trust. Where a trustee has denied the trust for more than 20 years, if the cestui que trust is under disability the statute will not begin to run until the disability is removed. Here the trust relationship arose less than 15 years before the bill was filed.

In a court of equity such disability is not confined to nonage or lunacy; any disability that wholly disables a party from asserting in a court his rights is as much a disability as those given exemption in statutes of limitation governing actions at law. This is shown by the rule that no time will protect a fraud so long as it could not have been discovered by ordinary diligence, but as soon as the fraud is known the statute begins to run. Before the discovery the party is under disability; after the discovery the disability is removed. So in the cases above cited where delay is due to failure of the Land Department to issue a patent.

Even if the disability under which Venancio Sanchez labored between 1895 and 1899 and under which these appellants have labored until the discovery of Alvarez Index is not sufficient to excuse failure to bring suit at an earlier day appellee can not admit on the record all the facts which establish that:

(a) Appellants never abandoned their rights.

(b) Had never had an opportunity to procure existing documentary evidence to establish their rights;

(c) Did not learn that their trustee had conveyed their estate until shortly before suit brought

and ask the Court without proof, upon the mere lapse of time, to determine that appellants have not in their bill stated a cause of action maintainable in equity.

If the rule be that in every cause where the defense of laches is set up its application depends upon the circumstances of the particular case, the onus of showing that the plaintiff neglected to do something the law bound him to do amounting to long continued acquiescence is on the defendant; surely he can not admit the plaintiff's statement of facts which explain away the delay to commence suit, and urge laches as a matter of law.

Lapse of time in equity is permitted to defeat an acknowledged right only on the ground of raising a presumption that the right has been abandoned, and this presumption will never prevail against opposing facts and circumstances outweighing it.

Wood on Limitations, p. 125, Sec. 60, Chap. 6.

Within what time a constructive trust will be barred must depend upon the circumstances of the case and these are always examinable.

Mishoud v. Girod, 4 How. 503, text 561.
Oliver v. Piatt, 3 How., text 411.

Hence the defense of laches can not be set up by demurrer, nor by motion to dismiss.

Laches is a neglect to do something that by law a man is obliged, or in duty bound to do.

The essence of laches is not merely the lapse of time. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy.

Mr. Justice Brandies in So. Pacific Co. v. Bogert, 250 U. S., text 488-489.

In that case 22 years had elapsed before suit.

The rule is well stated by Judge Morrow in these terms.

No hard and fast rule has been laid down by the courts which can be said to govern all cases wherein the defense of laches is involved. The lapse of time which might induce the application of the doctrine is not a determined period, but depends upon the circumstances of the particular case. One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly *unnecessary* delay on the part of the plaintiff in bringing or *prosecuting* his action, but that, by reason of some change in the condition or relation of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of plaintiff to be enforced.

London & San Francisco Bank v. Dexter Horton & Co., 126 Fed., text 601 citing cases.

It may well be questioned whether Venancio Sanchez was under any obligation to seek the aid of a court. The confirmation of the grant to Fornells inured to the benefit of the parties really interested both at law and in equity, and not merely to the benefit of Mary Ann Davis, the confirmee. This issuance of the patent by statute,

did not affect the interest of third parties. Their equities are reserved. The bare legal title was transferred by the patent to Mary Ann Davis.

Knight v. United States Land Co., 142 U. S., 161, 35 L. ed. 984.

Carpenter v. Montgomery, 13 Wall 480, text 495, 20 L. ed. 701.

The title taken and held by Davis operated primarily to the benefit of the heirs of Mary Ann Davis so far as the legal title was concerned; "But this in no wise operated to bar the parties beneficially concerned, and in justice and equity entitled to the possession and consequent ownership of the property of the remedies and relief they seek."

Garland v. Wynn, 20 How. 6, text 8.
Wilson v. Castro, 31 Cal. 420.
Salmon v. Symons, 30 Cal. 301 citing.
Estrada v. Murphy, 19 Cal. 272-274.
Clark v. Lookwood, 21 Cal. 220.
Emerish v. Penniman, 26 Cal. 124.

Under the patent Sanchez held a continuing right that he might assert at any time—equally as potent 15 years after the patent issued as at any time during the first seven years. All the beneficiaries under the grant from Spain were entitled to possession of the confirmed grant.

Davis' possession was Sanchez' possession.

Davis might have continued to claim the whole 175 acres under the patent to the end of the world, without injury to appellants so long as he did not transfer to a third party a greater estate than the patent vested him with, and failed to take and hold any occupancy or enclosure of the premises.

He did attempt to convey the whole 175 acres to appellee but appellee took with notice of appellants' interest and appellants have proceeded to have their estate decreed within seven years from the time appellee took his deed. True there has been delay, but not undue, unreasonable nor unexplained; hence there has been no laches.

PAYMENT OF PURCHASE PRICE WAS WITH NOTICE

It was urged in argument that Deering's equity was superior to appellants' because he had paid Davis the purchase price. "If a person will purchase with notice of another's right, his giving a consideration will not avail him. for he throws away his money voluntarily, and of his own free will."

Lord Chancellor Hardwick in Mead v. Ld. Orrery 3 Atk., text 238.

Appellee bought with constructive notice of the contest against delivery of the patent to Davis in the General Land Office and the recorded deeds.

(a) From Antonia Barrosa to Venancio Sanchez.
(b) From Venancio Sanchez to E. C. F. Sanchez et al.

The opinion of the trial Judge in this case, 288 Fed., text 416, says Venancio Sanchez "was charged with notice that in 1893 the grantor of defendant had received a conveyance of the three acres theretofore conveyed to the United States by his predecessor in title."

This conveyance of three acres to Davis was made in 1903. Mr. Sanchez died in 1899.

The principle of constructive notice under the recording statute urged to sustain the decree is fatal to appellee.

If appellants were charged with constructive notice of Davis' deed to appellee spread on the records, why was not appellee charged with notice of the deed from Antonia Barrosa to Venancio Sanchez and the deed from Venancio Sanchez to his brother's children?

We are advised that the fact is these deeds were not in the abstract of title furnished appellee for the reason that the abstractor did not know the description of the property therein in the Spanish words "Cayo Byscano" effected the property described as Key Byscane which Davis offered to sell appellee. Appellee has a case against the abstract company, but we contend the learned trial judge erred in finding he "occupies the position of a bona fide purchaser for value."

And further contend if such be his position he must make his defense by answer.

If and when appellee shall make the defense of laches according to the practice prescribed by the rules in Equity the trial court will apply the applicable principles, one of which is that in continuing trusts that are enforceable in a court of equity only, no length of time will bar the rights of the cestui que trust as against the trustee so long as the relation of trustee and cestui que trust continues, unless there be an open denial of the trust brought home to the cestui which requires him to act as upon an asserted adverse title.

When the facts alleged in the bill have been supported by testimony and documentary proofs, applying those principles to the facts of this case and appellants are found not entitled to the aid of a court of equity, they must submit to the loss of their valuable property. What they now ask of this Court is that the rules of practice as construed in the cited cases be applied to their case.

They ask this court to find there was error in denying them relief without a hearing on the merits upon

motion by which appellee has admitted they acted with all the despatch possible, against a party who with constructive notice of their rights acquired the legal title to the whole of a tract of land in which they owned an undivided half interest.

This Court should sustain their contention.

O'Keefe v. New Orleans, 273 Fed., text 561.

The rule is there declared to be that unless the motion clearly discloses that on the allegations of the bill, which are taken to be true, it must be dismissed upon final hearing, the preliminary motion to dismiss must be denied.

The bill prays for other and different relief:

Admitting only for the purpose of this argument that Sanchez knew when the patent was delivered in 1898, that Davis would claim under it the whole 175 acres—yet the bill should not have been dismissed.

All that appears on the face of the bill is that Davis obtained delivery of the patent in 1898 and conveyed the entire grant in 1913.

A conveyance of the common estate by one co-tenant does not amount to an ouster until the right to hold adversely is asserted under it.

Justice v. Lawson, 46 W. Va. 163, 33 S. E. 102.

Here appellants did not know appellee had any claim of title until after the bill was being prepared.

Should the trial Court on the testimony refuse a decree declaring appellee to hold the legal title as trustee, of the lands granted to Fornells, yet it could and should make the decree without prejudice to a suit for partition, the lands and riparian rights never having been possessed adversely to the estate of appellants therein.

Sections 2934 Rev. Genl. Statutes of Florida.

Both by the District Court and the Court of Appeals have wholly overlooked the grant made to Venancio Sanchez by the State of Florida by Chapter 791 Laws—the Riparian Act set out in paragraph 12 of the bill, and the prayer of the bill that defendant be decreed to convey to William J. Sanchez the legal title to an undivided half interest in the submerged lands lying on the Bay of Florida, within the extended lines of the survey of the grant to Pedro Fornells.

In 1856 the State of Florida, owner of the submerged lands between high and low water in the Bay of Florida, granted in fee to Venancio Sanchez, owner of an undivided half of the grant to Pedro Fornells the submerged lands to navigable water in front of said grant, measuring on the ocean and bay more than a mile.

Chapter 791 Laws of Florida; McClellan's Digest p. 689; Revised Statutes Section 454.

The State's grant is perhaps more valuable than the 175 acres of low sands, overflowed by hurricane tides, granted by Spain to Fornells.

Venancio Sanchez died seized of this riparian right. Neither he nor Mary Ann Davis took actual occupancy of this submerged land. It is now and since 1850 has been wholly without any occupancy and in the constructive possession of the holders of the legal title, a title separate and distinct from the title vested in Mary Ann Davis' heirs by the patent from the United States.

The District Court and the Court of Appeals were asked to determine and declare where the legal title to this valuable property now rests. If Waters Smith Davis never had any occupancy of this submerged land, nor his mother before him, could he convey to defendant more than the estate or interest granted by the State of Florida to the co-tenant of Vernancio Sanchez in 1850?

We respectfully ask this Court to find and declare whether William J. Sanchez as sole heir of his father and owner in fee of the submerged lands in front of the lands described in the patent to the extent of an undivided one-half interest, is barred from asserting his claim in a Court of Equity?

The grants from the State vested not an equitable estate but a legal one. How has that vested legal estate been divested or transferred to appellee? Are not appellee and complainant William J. Sanchez' tenants in common of this legal estate? Is not either party entitled to a partition of this estate?

The motion to dismiss should have been denied by the District Court, and the decree appealed from should be reversed and the case remanded with directions.

WILLIAM WHITWELL DEWHURST,
Solicitor for Appellants.

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IN THE SUPREME COURT
OF THE UNITED STATES

E. C. F. SANCHEZ, et al. :
Appellants, :
Vs. : No. 536
JAMES DEERING, :
Appellee. :

STATEMENT.

This case was decided by the District Court March 28, 1923.

288 Fed. Rep. 412, Sanchez v. Deering.

The opinion of the Circuit Court of Appeals was rendered March 18, 1924.

298 Fed. Rep. 286, Sanchez v. Deering.

Appellants were complainants below and will be referred to as Complainants. Appellee was defendant below and will be referred to as Defendant.

Complainants, by their bill, attacked defendant's title to certain land on Key Biscayne, in Dade County, Florida, seeking to have a trust declared as to an undivided one-half interest.

Defendant attacked the sufficiency of the bill by a motion to dismiss, which motion was sustained by the District Court; and the case was affirmed by the Circuit Court of Appeals.

The bill alleges that the claim originated in a Spanish grant in 1805 to one Fornells, that a half-interest in said claim was ultimately acquired through inheritance by a daughter of Fornells, Antonia Porsila (or Porala) who conveyed to Venancio Sanchez, through whom the appellants,

descendants of Venancio Sanchez, acquired their alleged equitable title.

Complainants' case rests largely on allegations of fraud on the part of Mary Ann Davis, through whom the defendant claims title.

Defendant's contention is based on the following title history set out in the bill:

In 1824 Mary Ann Davis presented to the United States Commissioners, theretofore appointed, her claim for confirmation to her of the title to the entire grant, accompanying her application with certain evidence of the acquisition by her of the claim of Fornells.

Record 5, 6.

The claim was by the Commissioners confirmed to Mary Ann Davis.

Record 5, 6.

Thereafter the action of the Commissioners was confirmed by act of Congress of February 8, 1827.

Record 10.

4 Statutes at Large 202.

In 1847 the land in question was surveyed and thereby segregated.

Record 8.

In 1896 the Commissioner of the General Land Office issued to Mary Ann Davis, then deceased, a patent, but because of a protest filed by appellants' ancestor the patent was withheld, pending consideration of said protest and an appeal by the protestant to the Secretary of the Interior, until 1898, when it was delivered to one of the heirs of Mary Ann Davis.

Record 10 to 15.

In 1913 the land was deeded to Waters S. Davis, who was one of the heirs of Mary Ann Davis and had acquired the interest of all the other heirs, to the defendant, James Deering.

Record 18-19.

The defendant took possession by a keeper having "a habitation somewhere on the island."

Bill 12, Record 19.

In 1920 defendant's title was attacked by this suit.

BRIEF

In his motion to dismiss the defendant relied upon the contention that the bill clearly showed laches on the part of the complainants, and by the decisions of the District Court and the Circuit Court of Appeals that contention has been sustained.

We submit that the decree of the District Court as affirmed by the Circuit Court of Appeals is correct, and urge not only the reason assigned by the District Court, namely, that the complainants had been guilty of laches after the issuance of the patent in 1896, but also the additional reason assigned by the Circuit Court of Appeals, namely, that the complainants were barred by laches before the patent was issued.

Proceeding chronologically, we shall present these two grounds of contention in inverse order.

First.

COMPLAINANTS WERE BARRED BY LACHES BEFORE THE PATENT WAS ISSUED IN 1896.

The defendant claims through Mary Ann Davis who held under a Spanish grant. The claim of Mary Ann Davis was confirmed to her by Act of Congress February 8, 1827.

Record 10.

4 Statutes at Large 202.

At the time of confirmation, the land had not been surveyed but it was surveyed and segregated in 1847.

Record 8.

The confirmation and survey, taken together, vested the legal title in Mary Ann Davis.

"If the claim be to the land with defined

> boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that tile. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, **and the confirmation will then immediately attach the title to the land segregated."**
>
> 21 Wallace 521
>
> 22 Law Ed. 606 (609)
>
> Langdeau vs. Hanes

Therefore, the legal title was in Mary Ann Davis from and after 1847. But even prior to 1847, in 1827, the claim of Mary Ann Davis had been confirmed.

The other claimants were in position to assert their rights in Court and it was their duty to do so. This necessity was pointed out in the Act of 1827 by the provision that the confirmation should not be construed "to prevent or bar the judicial decision between persons claiming title to lands confirmed."

We propose to show that:

1. The defendant and those under whom he claims had had the legal title, when this suit was brought, for more than seventy-two years.

2. The complainants and their predecessors in title have been chargeable since 1827 with knowledge of the claims of defendant and his predecessors in title.

3. The complainants and their predecessors have therefore been guilty of laches.

1.

THE DEFENDANT AND THOSE UNDER WHOM HE CLAIMS HAD HAD THE LEGAL TITLE, WHEN THIS SUIT WAS BROUGHT, FOR MORE THAN SEVENTY-TWO YEARS.

The grant was confirmed by Commissioners to Mary Ann Davis in 1824. This fact is not disputed by appellant, although it does not clearly appear in the record because of the fact that the exhibits to the bill, which are a part of it, are not printed. The fact is established, however, by:

Record 6, 10.

4 Am. State Papers, 161, 218, 263, 268, 275.

The Commissioners reported their action to the Secretary of the Treasury January 1, 1825, and the report was by the Secretary referred to Congress, **February 21, 1825.**

4 Am. State Papers, 83, 157, 161.

The act of Congress of February 8, 1827, confirmed all claims "contained in the reports, abstracts and opinions of said Commissioners which have been transmitted to the Secretary of the Treasury according to law and referred by him to Congress the **21st of February, 1825,** and the 21st of February, 1826."

Bill, p. 6, Record 10.

4 Statutes at Large, 202.

These confirmations taken with the survey in 1827 invested the confirmee with the legal title.

> "A confirmation of a Spanish or Mexican grant of land in California segregates the land from the public domain and invests the confirmee with legal title."
>
> 13 Wall. 480; 20 Law. Ed. 698 (Headnote 3), Carpentier v. Montgomery.
>
> "The commissioners decided in favor of the heirs and confirmed their claim, and transmitted a transcript of their decision to the Secretary of the Treasury, by whom it was laid before Congress.
>
> "By the Act of March 3rd, 1807, * * * * * 2 Stat. at L., 446, this decision, and all other de-

cisions in favor of persons claiming lands in the District of Vincennes, contained in the transcript transmitted to the Secretary of the Treasury, were confirmed. This confirmation was the fulfilment of the condition stipulated in the deed of cession so far as the claimants were concerned. It was an authoritative recognition by record of the ancient possession and title of their ancestor, and gave to them such assurance of the validity of that possession and title as would be always respected by the courts of the country. The subsequent clause of the Act providing for the issue of a patent to the claimants, when their claim was located and surveyed, took nothing from the force of the confirmation.

"In the legislation of Congress a patent has a double operation. It is a conveyance by the Government when the Government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.

"In the present case the patent would have been of great value to the claimants * * * *. But it would have added nothing to the force of the confirmation. The survey required for the patent was only to secure certainty of description in the instrument, and to inform the govern-

ment of the quantity reserved to private parties from the domain ceded by Virginia.

"* * * * A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit-claim from the government."

21 Wall. 521; 22 Law. Ed. 606 (p. 608 and 609).

Langdeau v. Hanes.

"The confirmation by commissioners appointed under the act of Congress of March 3, 1807, (2 Stat. at L. 440, chap. 36), of a claim to 913.98 acres of land in the territory of Orleans, based on occupancy and settlement, followed by the confirmation by Congress in the Act of April 29, 1816, (3 Stat. at L. 329, chap. 159), of the claim so confirmed, and by a survey, passed title so as to permit prescription, founded on uninterrupted possession, to begin to run before the patent issued."

192 U. S. 94; 48 Law. Ed. 359 (Headnote).

Joplin v. Chachere.

"The confirmation operated as a grant, to all intents and purposes, and that a grant may be made by a law as well as a patent pursuant to a law, has been settled by the repeated decisions of this Court."

3 Otto, 78; 23 Law. Ed. 807 (p. 808),

Ryan v. Carter.

This point was fully discussed and settled in accordance with our contention in

236 U. S. 635, Wilson Cypress Co. v. Marcos.

In the foregoing cases the confirmation was by commissioners in one, by direct act of Congress in one and in the

other two by the Commissioners and also by direct act of Congress.

In at least two of the foregoing cases the statute under which confirmation was made by Commissioners is shown to have contained a proviso protecting claims of third parties, as in the instant case.

The doctrine of the foregoing cases is fully applicable in the instant case.

We concede that confirmation does not preclude third parties from asserting their rights; but we contend that the confirmation vests the legal title in the confirmee and that thenceforward a third party must exercise diligence in asserting his claim.

We submit that our contention is fully sustained by the foregoing cases.

The complainants rely on certain Alabama cases but those cases are not applicable here as we think will appear from what follows.

Counsel cited below the case of Nelson v. Weekley, 177 Ala. 130, 59 So. 157, in which it was held "that the United States held the legal title to the land until the issuance of the patent."

But the distinguishing feature of that case is that **there never had been a confirmation**, as clearly appears from the following language taken from the opinion of the Court in that case.

> "A certain class of named claimants or donees are entitled to have a formal confirmation of their title. * * * * It is plain that John Weekley does not come within this class. The part of section 6 referred to reads as follows: 'When it shall appear to them (commissioners) that the claimant is entitled to a tract of land under the articles of agreement and cession with

Georgia aforesaid, in virtue of a British or Spanish grant, legally and fully executed, they shall give a certificate thereof describing the tract of land and the grant, and stating that the claimant is confirmed in his title thereto by virtue of the said articles; * * * *.'

"John Weekley does not come within the class described in the above quotation, but does come within the class described in that portion of said section 6 immediately following, and which reads as follows: 'When it shall appear to the said commissioners that the claimant is entitled to a tract of land by virtue of a settlement under the Bourbon act of Georgia, recognized in the said articles of agreement and cession, or of either of the two first sections of this act, they shall give a certificate thereto, stating the circumstances of the case and that the claimant is entitled to receive a patent for such tract of land by virtue of this act.'

* * * * * * * *

"As to the two clauses in section 6 of the act of March 3, 1803, above quoted, the first clause quoted declares that the certain class of claimants or donors therein named, upon performance of required conditions and being in the category named, shall be given a certificate describing the lands and the grant and stating that the claimant is confirmed in his title, and which being recorded by the register of the Land Office, shall amount to a relinquishment forever on the part of the United States to any claim whatever to such tract of land. It was the evident intention of Congress to have the title pass when all

conditions and requirements had been performed and certificate issued and recorded under this clause.

"Now it is equally clear, from the very distinction and difference made by the terms in the next clause of section 6 above quoted, from the first clause that it was not the intention of Congress for the title to pass automatically as to the class named in section 2, when the commissioners reported that the 'claim is supported agreeably to the requirements of the law', and 'that the claimant is entitled to the patent'."

177 Ala. 130,

59 So. 157 (pp. 158 and 159),

Nelson v. Weekley.

Counsel cited McArthur v. Brue 190 Ala. 563, 67 So. 249, where it was held that the legal title did not pass until a patent issued; but here again there had never been a confirmation. The Court in construing the act of Congress said:

"It appears that there was not even an attempt to grant any land by the act of Congress in question, but only to provide for a survey, or location, or identification, of certain claims, and, when so located and identified, for a grant by the issuance of a patent, which was accordingly done in this case."

190 Ala. 563

67 So. 249 (p. 250),

McArthur v. Brue.

The statute involved in McArthur v. Brue (3 Statutes at Large, 528), provided in section 3 for confirmation in certain cases by commissioners; and in section 12 for the issuance, in another class of cases, of a certificate to the claimant by the register and receiver when in his opinion the claimant is

entitled thereto, under such instructions as may be received from the Commissioner of the General Land Office; and section 12 concludes as follows:

> " 'And where it shall appear to the satisfaction of the Commissioner of the General Land Office that the certificate has been fairly obtained according to the true intent and meaning of this act, then and in that case a patent shall be granted in like manner as for other lands of the United States'."
>
> 3 Stat. at Large 528.

It seems manifest that the claimant in McArthur v. Brue came within the class covered by section 12 of the statute quoted; and consequently there could not have been a confirmation, because it is well recognized that the power of confirmation has never been conferred on the register and receiver.

The case of McArthur v. Brue is further clarified by another Alabama case, construing the same statute, in which the Court clearly recognizes the distinction between a confirmation and a mere certificate or report.

> 80 So. 362 (Ala. Dec. 19, 1918)
> Stein vs. England.

In McArthur v. Brue, the decision is partly on the authority of Price v. Dennis in which it was held that in that case "It was intended by Congress that the patent should pass the legal title, and that it should not pass until the patent was issued"; but the Court recognized the distinction for which we contend in the following language:

> "The legal title can pass out of the United States as well by such a grant of Congress as by a patent, and if a patent is issued thereafter it may be that it is merely evidentiary of the prior grant and selection."

159 Ala. 625
49 So. 248 (p. 250),
Price v. Dennis.

Counsel cited in the Court below the case of United States v. Juan Perchman (7 Peters 51; 8 Law. Ed. 604); but it is not apposite because in that case there was no patent, and no confirmation. There had been a rejection by the Commissioners and the question in the case was whether by that rejection the claimant was finally deprived of his right and interest in the land involved in the suit.

We therefore submit that:

The defendant and those under whom he claims had had the legal title, when this suit was brought, for more than seventy-two years.

2.

THE COMPLAINTANTS AND THEIR PREDECESSORS IN TITLE HAVE BEEN CHARGEABLE SINCE 1827 WITH KNOWLEDGE OF THE CLAIMS OF DEFENDANT AND HIS PREDECESSORS IN TITLE

The bill shows that the complaintants claim under a deed from Antonia Porsila to Venancio Sanchez, that such deed was executed May 6, 1843, that Venancio Sanchez lived until 1899, and that the complaintants claim under Venancio Sanchez as heirs and grantees.

Bill 4, Record 7, 16.

When Venancio Sanchez took the deed from Antonia Porsila in 1843, Mary Ann Davis had stood as confirmee of the land since 1827, when her claim was confirmed by act of Congress, if not since 1824, when it was confirmed by the Commissioners,—a period of sixteen or possibly nineteen years.

Therefore, Venancio Sanchez bought a stale claim.

It can be reasonably inferred from the bill that Venancio Sanchez knew the history of his alleged title, which rested

on the original Fornells grant; but actual knowledge is not necessary. He was presumed to know the law which required that his claim should have been presented and confirmed; and he was chargeable with knowledge of all that had occurred to affect his title. He could not make out his title except by reference to the history of the Fornells grant, which was to be found in the records of the General Land Office.

73 Tex. 319,
11 S. W. 331,
Dodge v. Littler.
Webb on Record of Titles, Sec. 135.

This point is well covered by the case of Wilson v. Castro. There the Court said:

> "If the widow of Buelna had no property interest in the land which she and her husband, Rodriguez undertook to convey to Castro, then Castro could not, by means of the deed to him, acquire any right or interest therein. It was not necessary that he should have had actual notice of the rights and interests of the particular heirs at law mentioned in order to render invalid the conveyance made to him."
>
> * * * * * * * * *
>
> "and it is not to be supposed that Mrs. Rodriguez was not aware of the source of her former husband's title * * * * nor can it be presumed that when Castro obtained his deed from her and her husband, Rodriguez, he was not aware of the grant made to Antonio Buelna."

31 Calif. 420,
Wilson v. Castro.

> "No principle is better established than that a purchaser must look to every part of the title which is essential to its validity."

15 Peters 93 (111),
10 Law Ed. 672 (679),

Brush v. Ware.

Therefore we submit that:

The complaintants and their predecessors in title have been chargeable since 1827, with knowledge of the claims of defendant and his predecessors in title.

3.

THE COMPLAINTANTS AND THEIR PREDECESSORS HAVE THEREFORE BEEN GUILTY OF LACHFS

From 1843 to 1899 Venancio Sanchez was advised of his rights, if he had any. The legal title was after 1847, in the confirmee, Mary Ann Davis and her heirs, and Sanchez was not in actual possession of the land. Therefore the burden was on him; but during all that time he instituted no legal proceedings to establish his claim or to attack the Davis legal title.

The bill alleges, by way of excuse, that the complainants were advised of the relationship between Rafael Andreu and Antonia Porsila, which made them joint heirs of their Mother, the widow of Peter Fornells; but that they were unable, until 1920, to produce evidence of such relationship.

It is plainly apparent that the progress of time which was taking the complainants towards the discovery of the evidence they wanted, was likewise taking the defendant and the Davis interests away from the possibility of discovering evidence in rebuttal. The claim was barred by laches before the loss of the evidence which complainants have now discovered.

If Venancio Sanchez had acted with the promptness which taking the complainants towards the discovery of the evidence he could doubtless, in 1843, have produced Antonia Porsila herself as a witness to the facts which complainants now rely on. He had every reason to act at that time. He had bought a stale claim and was asserting the invalidity of

Mary Ann Davis' legal title. It was incumbent upon him to act promptly. His failure to do so as long as he lived, until 1899, is clearly imputable to him as fatal laches and complainants cannot be in better position than he was in.

5 Pomeroy Equity Jurisprudence,
Secs. 21 to 23. (Edition of 1905)

In a New Jersey case where the delay was "for the long period of nine years and almost eight months", the Court said:

> "Lapse of time alone is deemed by the authorities to be a sufficient ground of estoppel in cases like the present, when the court cannot feel confident of its ability to ascertain the truth now, as well as it could when the subject for investigation was recent, and before the memories of those who had knowledge of the material facts have become faded and weakened by time. To constitute estoppel of this description, it is not essential that any actual loss of testimony, through death or otherwise, or means of proof, or changed relations, to the prejudice of the other party, should have occurred. But the estoppel arises because the court cannot, after so great a lapse of time, rely upon the memory of witnesses to reproduce the details that entered into the final execution of the instrument of settlement."
>
> 64 N. J. Eq. 773
> 53 Atl. 625 (628),
>
> Lutjen v. Lutjen.

The reason and wisdom of this rule is well illustrated in the instant case. In the affidavit of Vernancio Sanchez, set out in the bill of complaint, appears this statement:

> "* * That said transaction occurred many

> years ago and affiant does not now recollect all the details of the relationship of his grantors to Peter Fornells or Bonelli to whom the said lands were granted, but affiant recollects that one of his grantors declared to him that she was the sister of Rafael Andreu" * * * *.

Record 13

In considering an excuse for laches, the Courts will look not only to the complaintant's lack of knowledge, but also to the effect of the long delay on the rights of defendant.

> "In order to excuse such acquiescence or laches, fraud or concealment must be shown, and the facts must be particularly set out in the bill".

2 Wall. 87; 17 Law. Ed. 836 (Headnote)
Badger vs. Badger.

The complainants attempt to excuse their laches on the ground that they could not find the **evidence** to establish their rights; but there is not an allegation in the bill which in any way connects the defendant and his predecessors in title (The Davises) with any concealment of this evidence or any responsibility for its loss.

> "Long acquiescence and laches by parties out of possession are productive of much hardship, and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor."

7 Howard 234; 12 Law. Ed. 681
Wagner v. Baird.

We submit that:

The complainants and their predecessors have therefore been guilty of laches.

SECOND

THE COMPLAINANTS ARE CHARGEABLE WITH LACHES IN HAVING NEGLECTED UNTIL 1920 TO ASSERT THEIR RIGHTS IN COURT, AFTER THE ISSUANCE OF THE PATENT IN 1896, AND ITS DELIVERY IN 1898 (R. 10, 12).

In the interval between the issuance and delivery of the patent, the Sanchez interests protested the issuance of a patent by the Commissioner and appealed from the Commissioner's award of patent to the Secretary of the Interior and had opportunity to be fully heard.

R. 10 et seq.

The issuance and delivery of a patent after protest and contest by the Sanchez claimants was certainly a fair warning to those claimants that a legal proceeding was necessary to preserve their rights if they had any.

And when the warning brought forth no action by the claimants there was a reasonable inference that claimant's contest had ended.

The statutes did not prescribe a time within which the issuance of the patent must be attacked in court, but by analogy it might be said that a sufficient time would have been that allowed for a writ of error or an appeal from a judicial decree or judgment having a similar effect.

Certainly, after the patent had stood without attack for fifteen years, when the defendant contemplated a purchase, the history of the issuance of the patent, the contest over it, and its final delivery followed by fifteen years of inaction would have impressed an investigator not with the conviction that there was an outstanding claim of ownership, but rather with the certainty that the contest was abandoned.

Complainants now say by way of excuse that they would have brought the suit sooner if it could have been maintained, and by exactly the same process of reasoning, any investi-

gator would have been led to the conclusion that there was no claim to be asserted.

The issue and delivery of the patent under such circumstances will not be over-ruled by the Courts.

14 Okla. 610,
78 Pac. 561,
Cagle v. Dunham.
199 U. S. 391; 50 Law. Ed. 241,
Estes v. Timmons.

In a case where an **actual settler** had occupied land for 29 years and still occupied it when he started suit, it was held, as stated in the headnote, as follows:

> "A settler on public lands, intending to enter the same under the preemption laws, who does not appeal from the decision of the local land office rejecting his application, and who delays 17 years after the land has been patented to another before bringing suit therefor, is barred by laches from the right to equitable relief."

101 Fed. 739,
Osborne v. Altschul.

The alleged excuses for delay cannot inure to the benefit of complainants without gross injustice to the defendant.

The defendant is shown by the bill to have acquired the Davis title in 1913, fifteen years after the patent was delivered; and it does not appear that the records show any action on the part of the Sanchez interests between 1896 and 1920, or that the defendant had personal knowledge of any claim asserted by complainants, or their predecessors.

Mere assertion of a claim with no attempt at enforcement will not avoid the imputation of laches.

137 U. S. 556; 34 Law. Ed. 776 (780),
Mackall v. Casilear.

The defendant acquired the legal title which had first

vested in the confirmee, Mary Ann Davis, and was later recognized and ratified by the issuance of the patent.

His chain of title was complete, and was in no way dependent on the Sanchez claim. Therefore, he is not affected by the doctrine of Wilson v. Castro, supra.

But even if he is chargeable with notice of the Sanchez claim, what would the records have revealed to him?

Merely that Venancio Sanchez bought a stale claim in 1843 and suffered it to be barred by his laches in taking no action until 1896; that he then contested the claim before the land department and was defeated; that his defeat had been apparently acquiesced in by his taking no action since 1896.

The defendant was therefore misled by the conduct of Venancio Sanchez and the complainants.

Where delay has been seriously prejudicial to the adverse party who has not been guilty of fraud or concealment the laches will not be excused.

2 Wall. 87; 17 Law. Ed. 836 (Headnote)
Badger v. Badger;
7 Howard 234; 12 Law. Ed. 681 (Headnote)
Wagner v. Baird;
158 U. S. 416; 39 Law. Ed. 1036
Abraham v. Ordway.

The excuse for complainants' laches during this period is the same as that offered for the earlier laches, namely, that they were unable to find the evidence to establish their rights.

Our answer on this point has already been set out.

SUMMARY

Our contention is that the complainants are barred:

1. By the laches of Antonia Porsila from 1827 to 1843;
2. By the laches of Venancio Sanchez from 1843 to 1896;
3. By the laches of complainants from 1896 to 1920.

We contend that the excuses for laches presented by the

bill cannot avail the complainants, because their inability to discover evidence is not shown to be in anyway chargeable to the defendant or his prodecessors, and because the allowance of such an excuse would work injustice to the defendant, who has been by the lapse of time deprived of the possibility of producing evidence.

The legal title has been in defendant and his predecessors since 1847, and a legal title once vested cannot be divested bv mere assertion, but only by the aid of the Courts; and such aid was not sought until 1920.

We submit that the bill was rightly dismissed.

FREDERICK M. HUDSON,

Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1925.

E. C. F. Sanchez, Eugene E. Sanchez, Mabel Sanchez, et al., Appellants, *vs.* James Deering.	Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

[March 1, 1926.]

Mr. Justice McReynolds delivered the opinion of the Court.

By a bill filed April 7, 1920, appellants sought to establish their right to one-half interest in 175 acres of land on Key Biscayne, Dade County, Fla., granted by Governor White to Pedro Fornells January 18, 1805, when the Floridas were under the dominion of Spain. Appellee Deering acquired legal title to the whole tract June 28, 1913.

In 1824, under claim of ownership through conveyance from Raphael Andreu, stepson of Fornells and alleged by her to be his sole heir, Mary Ann Davis obtained confirmation of the grant in herself by the Board of Commissioners empowered under the Act of March 3, 1823, c. 29, 3 Stat. 754, to ascertain and confirm title to East Florida lands arising under patents, grants, concessions or orders of survey dated prior to January 24, 1818. The Board's action was approved and confirmed by Act of February 8, 1827, c. 9, 4 Stat. 202. In 1847 the lands were surveyed under direction of the Surveyor General and segregated from the public domain.

June 30, 1827, Mrs. Davis and her husband deeded three acres to the United States and the Cape Florida Lighthouse was constructed thereon. They subsequently abandoned the light and, March 4, 1903, conveyed the three acres to Waters S. Davis, one of the heirs of Mary Ann Davis whose death occurred in 1885. He had purchased the interests of all other heirs during 1893. April 23, 1896, patent for the 175 acres issued to Mary Ann Davis, but this was not delivered until 1898 because of protest by Venancio Sanchez, who claimed an interest. This protest was overruled by the Surveyor General, the Land Commissioner and the Secretary

of the Interior. June 28, 1913, Waters S. Davis deeded the lands to Deering.

Complainants deraign their title to an undivided one-half interest through deed to Venancio Sanchez from Antonia Porsila (or Porala), daughter of Pedro Fornells and half sister of Raphael Andreu, executed by her May 26, 1843. About 1840 the husband of Mary Ann Davis sought to interest Sanchez, then and long afterwards a merchant at St. Augustine, Fla., in developing Key Biscayne. As a result, it is alleged, Sanchez discovered that Mrs. Davis did not own the entire property and that Antonia Porsila had inherited an interest therein. Accordingly he went to Havana and there secured the conveyance of the latter's interest.

Sanchez died in 1899. He knew Raphael Andreu, who lived for a long time at St. Augustine and probably died there, but the time is not shown. It does not appear when Antonia Porsila died.

Complainants sought to meet the anticipated defense of laches by alleging that they were not able to secure legal evidence of the relationship between Raphael Andreu and Antonia Porsila until the discovery of an index to the Spanish archives during the year 1919.

The trial court dismissed the bill upon motion, holding that appellants were chargeable with laches because of the long delay in seeking relief after issuance of the patent of 1896. The Circuit Court of Appeals affirmed this decree upon the view that the delay extended from the survey of 1847 when Mary Ann Davis secured full legal title. 298 Fed. 286.

Under circumstances very similar to those here presented *Wilson Cypress Co.* v. *Marcos,* 236 U. S. 635, holds that confirmation of the Spanish grant by Congress followed by survey of the land passed the legal title. We can see no reason to depart from this view. The title of Mary Ann Davis dates from 1847. For more than seventy years thereafter appellants and their predecessors failed to assert their rights, if any, by legal proceedings. We agree with the Circuit Court of Appeals "that it is too late now to enter into the merits of a claim of title which could have been asserted and enforced if good, and rejected if bad, while the witnesses who knew about it were living and could have testified with reference to it."

The decree is

Affirmed.